2012 Legal Issues Update

Municipal Police Training Committee

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What Happened in 2012?

The Legal Issues Update will highlight recent cases and legislation in Massachusetts, review significant cases throughout the country, and revisit former cases that are still relevant. In 2012, there were only a handful of significant cases that impacted policing in Massachusetts. Despite the lack of game changing cases, a couple of issues continue to reappear in the world of policing. Included below are some of the revolving issues: Decriminalization of Marijuana, Body Cavity Searches, Dog sniffing, Human Trafficking, Criminal Harassment, Videotaping Law Enforcement and CORI.

This document is intended to support 8 hours of instruction.

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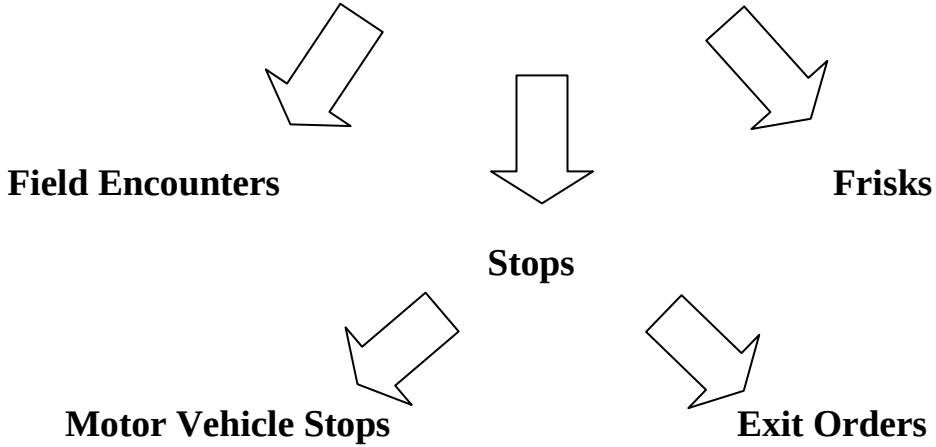
I. CONSTITUTIONAL/CRIMINAL PROCEDURE

A. Field Encounters, Stops and Frisks



1. Types of Stops

a. Threshold Inquiries and Detention

When does a threshold inquiry evolve into a seizure?

Commonwealth v Lyles, 453 Mass. 811 (2009)

Background: The police observed the defendant, Lyles, near a community housing development where the police had previously received numerous complaints about drug activity. Since the police did not recognize Lyles, who was walking alone on the sidewalk, they exited their unmarked vehicle and asked for his name and identification. Although Lyles provided his identification, the police checked for outstanding warrants. The police arrested Lyles after learning he had an outstanding warrant. While booking Lyles, the police recovered nineteen plastic bags of heroin and cash from his person.

Conclusion: The court held that the police seized Lyles when they approached him and asked for his identification while they checked for warrants. The police's initial encounter with Lyles became a seizure when the police detained him while verifying his identification. A reasonable person in these circumstances would not feel free to leave while the police held onto his identification. The court suppressed the drugs recovered from Lyles because the police lacked reasonable suspicion to seize Lyles. If the police had only asked Lyles for his name without taking his identification, a seizure would not have occurred. However, when the police took his identification, it was evident that Lyles was not free to leave until the police returned his identification. See ***Commonwealth v. Fraser***, 410 Mass. 541, 544 (1991). **If a reasonable person feels they are not free to leave, a seizure has occurred.**

Can a stop be justified even if it is determined that there is case of mistaken identity?

United States v. Phillips, 679 F.3d 995 (8th Cir. 2012)
Background: While on patrol, the police received information that a fugitive was traveling in the area with a female companion. Based on the description the police had received, an officer on patrol stopped the defendant, Jerdes, and his female companion. Jerdes matched the description of the fugitive and separated from his companion as the officer approached. The officer asked Jerdes for his name and identification. Jerdes was unable to provide any identification but disclosed to the officer that he had a marijuana pipe and a firearm. The officer arrested Jerdes and charged him with unlawful possession of a firearm. Although it was later determined that Jerdes was not the fugitive, the officer maintained that he had reasonable suspicion to stop him. Jerdes challenged the stop arguing that the evidence should be suppressed because the officer mistakenly believed that he was the fugitive.

Conclusion: The court held that even though this was a case of **mistaken identity**, the officer had reasonable justification to stop Jerdes based on the totality of the circumstances. **As long as the police have reasonable suspicion, the stop will be valid even if there is erroneous information.**

b. Motor Vehicle Stops and Exit Orders

Can officers search a vehicle if the driver is unlicensed and there are no additional factors?

***Commonwealth v Roberto Lantigua,* 38 Mass. App. Ct. 526 (1995)**
Background: While on patrol, officers driving in an unmarked cruiser passed two vehicles stopped on the side of the road. The officers became suspicious when they observed a person known to them, walking towards one of the vehicles. The officers reversed

direction and approached the vehicles. As the officers pulled behind the vehicles, one vehicle pulled away at a high rate of speed. The officers followed that vehicle into a parking lot of an apartment complex. When the vehicle stopped in the lot, the officers parked their cruiser behind it. The officers observed the defendant, Lantigua, lean forward before exiting the vehicle. The officers asked Lantigua for a license and registration. Lantigua was unable to produce a license and offered to get his registration out of the glove compartment. Due to safety concerns, the officers ordered Lantigua and the passenger out of the vehicle. When one of the officers opened the driver's door, he observed plastic bags containing white powder on the floor. Based on his observations, the officer opened the console and found another bag of white powder. The officers arrested Lantigua for drug trafficking. Lantigua filed a motion to suppress the search of the vehicle and the entry into the vehicle.

Conclusion: The court held the search of the vehicle was lawful because Lantigua had no license. The fact that Lantigua was unable to produce a license or a registration, which is a criminal offense itself, provides officers with reasonable suspicion that Lantigua could be involved in other criminal offenses. Pursuant to M.G.L. c. 90 §11 operating without a license in possession, M.G.L.c. 90 §10 operating without having been issued a license and M.G.L. c. 90 §23 operating after suspension or revocation of license gave the officer the right to arrest Lantigua. Additionally, the officers were justified in searching the interior portions of the vehicle that were accessible to Lantigua for safety reasons. In this case, the officer observed Lantigua lean forward prior to exiting the vehicle. The police have probable cause to order a driver out of a vehicle if the driver has no license. **Inability to produce a license or a registration reasonably gives rise to a suspicion of other offenses, such as automobile theft, and justifies heightened precautions for the officers' own safety.**

Can officers order occupants out of car at gun point if there is a concern that the occupants may be armed and dangerous?

***Commonwealth v Stack*,** 49 Mass. App. Ct. 227 (2000)

Background: After executing a search warrant, officers learned that several gang members frequently gathered at an apartment belonging to the defendant, Rosemary Stack, in Holyoke. One evening, while conducting surveillance of Stack's apartment, officers observed a maroon Buick with a white top parked outside of the apartment. The officers learned that the gang had devised a plan to kill an individual and execute three armed home invasions. The officers distributed the information at roll call to look for a maroon Buick with a white top. Around 3:30 A.M., an officer driving in the area observed a maroon Buick with a white top, parked in a lot. The officer also noticed a Datsun parked near the Buick. As the officer approached, both vehicles left the area and the officer called

for backup. The officer stopped the Datsun and asked the driver for a license. When the driver was unable to produce a license, the officer ordered him out of the car. While speaking to the driver, the officer noticed that the front passenger was "shifting around," his hands moving "all over in the interior." Since the officer had safety concerns, he ordered the passenger out of the Datsun with his gun drawn. When the officer opened the driver's door, he found a barrel of a gun sticking out from under the driver's seat. Another officer, who had stopped the Buick, ordered passengers out the vehicle when he observed the individuals making furtive movements. The officer recovered a shotgun sticking out from the driver's seat. The discovery of the shotguns gave more than probable cause for the officers to search the vehicle for further contraband.

Conclusion: In the present case, the officers had received information that a Buick would be transporting armed gang members to Holyoke. The officer had probable cause to stop the vehicle when he found a Buick matching the description (along with a Datsun) idling in a high crime area at 3:30 A.M. with a group milling about and dispersing at the sight of a marked cruiser. In addition to locating the vehicles, the officers observed passengers making furtive movements inside the vehicles. The supervising officer suspected that there was potential for armed combat after observing the scene. **The court held that the exit order and pat/frisk were reasonable and within the range of lawful self-protective activity by the police when considering the totality of the circumstances. If there is a concern about safety and there is probable cause for arrest, an officer can conduct a search incident to arrest for weapons prior to making a formal arrest.**

Are the police justified in stopping an idling car that is in a parking lot late at night, with its interior lights on?

Commonwealth v Helme, 399 Mass. App. Ct. 298 (1987)

Background: While on patrol, officers observed a vehicle idling in a parking lot with its interior lights on, and headlights off. The officers proceeded to stop the vehicle by blocking the parking lot exit with the police cruiser. With the aid of a flashlight, the officers asked the driver if everything was all right. The officers observed an open packet containing a white powder on the front seat between the defendant and the passenger. After the officer discovered what he believed to be contraband, he conducted a pat/frisk and found more contraband. The defendant was arrested and filed a motion challenging the stop.

Conclusion: The police had no justification to initiate a threshold inquiry of the defendant by blocking the defendant's vehicle. Without any evidence that criminal activity had occurred or may occur, asking if everything was alright became an intrusion of

privacy. Although the police stated it was their policy to check parked vehicles, the court concluded absent any criminal activity, the policy was too broad to check every vehicle that was parked with its interior lights on. **The police lacked reasonable suspicion to stop a car that was idling in a parking lot with its interior lights. Without any additional factors suggesting criminal activity is afoot, the stop is not justified.**

Are officers justified in stopping a motor vehicle if there are no motor vehicle violations but the police had reasonable suspicion that the driver is a suspect in a shooting?

United States v Davis, WL3518479 (2012)

Background: While on patrol, the police received information that there was a shooting and the suspect may still be armed. The police observed an individual who matched the description of the suspect involved in a shooting and stopped the vehicle he was driving. Although the basis for the stop was solely to ask the driver for identification, the police ordered the occupants out of the car when they observed the driver and passenger making furtive movements. When the police conducted a pat/frisk of the driver and passenger, they discovered a pistol in the passenger's front pocket. The police arrested the driver and the passenger for unlawful possession of a firearm. The driver and passenger filed motions to suppress the stop.

Conclusion: The court held that the police had reasonable suspicion to stop the vehicle because the driver of the vehicle matched the description of a **suspect in a recent shooting**. Additionally, the police's exit order was valid because they observed the driver and passenger making furtive movements within the vehicle as they approached. **The police had reasonable suspicion to stop the vehicle because they had received a description of a suspect involved in a shooting that resembled the driver.**

Was an officer justified in searching a vehicle after he detected an odor of freshly burnt marijuana coupled with additional factors?

Commonwealth v Daniel, 81 Mass. App. Ct. 306 (2012)

Background: The defendant, Daniel, and the driver, Alyson Tayetto, were charged with multiple firearms offenses after an officer recovered a firearm within the vehicle's glove compartment during a search. The officer stopped the vehicle because one of the headlights was out. As the officer approached the vehicle, he detected an odor of marijuana and observed Daniel hunched over, rocking back and forth. The officer asked Daniel and Tayetto if they had been smoking marijuana and they responded "no." Tayetto

then produced two small baggies of marijuana from her person and Daniel removed all personal effects from his pockets including a pocket knife and said, "This is all I got." The officer found Daniel's actions unusual and ordered Daniel and Tayetto out of the vehicle. The officer conducted a pat/frisk and searched the vehicle. The officer recovered a loaded semi-automatic pistol in the vehicle's glove compartment.

Conclusion: Although the officer smelled marijuana, he stopped the vehicle for erratic driving and motor vehicle infractions. Since the officer was alone and had observed Daniel making unusual movements during the stop, the court held the officer's exit order was justified. Furthermore, the officer explained that based on his experience as a patrol officer, it was extremely unusual for Daniel to voluntarily empty the contents of his pockets. Based on the motor vehicle infractions and the officer's observations, the court determined that the pat/frisk was valid. **Smelling marijuana alone is not sufficient to effectuate a stop.**

Factors to Consider:

- **If the officer only had detected the smell of marijuana without any additional factors, he would not have been justified in ordering Daniel and Tayetto to exit the vehicle.**
- **Unlike the *Cruz* case, the officer in the underlying matter had additional factors that provided him with probable cause to search the vehicle without a warrant. The officer's actions were justified under the motor vehicle exception.**
-

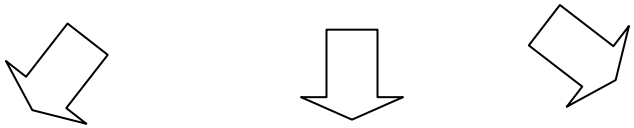
Is the odor of marijuana alone sufficient to order passengers to exit a motor vehicle?

Commonwealth v Cruz, 459 Mass. App. Ct. 459 (2011)

Background: The police observed the defendant, Cruz, seated in the passenger side of an automobile that was parked with its windows down in front of a fire hydrant. As the police approached the vehicle, they observed the driver light a cigarette. The police detected an odor of marijuana and noted that the driver and Cruz were acting nervous. The police ordered the driver and Cruz out of the vehicle and asked whether Cruz had "anything on his person." Cruz told the police that he had a "little rock" for his own use. The police conducted a pat/frisk and seized approximately four grams of crack cocaine from Cruz. After recovering the drugs, the police arrested Cruz and charged him with possession of a Class B substance and possession of a Class B substance with intent to distribute. Cruz challenged the stop and argued that the exit order was not lawful due to the recent decriminalization of marijuana that was passed as a result of the 2008 ballot initiative. Prior to this change in the law, detecting an odor of marijuana provided the police with probable cause to suspect that criminal activity had occurred or may occur.

Conclusion: In this case, the exit order was not valid because there was no evidence that the police suspected that Cruz possessed more than ounce of marijuana. The key point that the court reviewed was whether the police had reasonable suspicion to believe Cruz was engaged in criminal activity. While the police could stop the vehicle for parking illegally in front of a fire hydrant, there were no additional factors, other than the odor of marijuana to issue an exit order. **The odor of marijuana alone is insufficient to effectuate a stop.**

Exit Orders are Permissible



Officer Safety | Suspicion of Criminal Activity | Automobile Exception Search

Differences between Cruz and Daniel

Factors to Consider	Cruz	Daniel
Reason for the Stop	Odor of Marijuana alone	Motor vehicle violations
Observations made by the Officer	Lighting cigarette Parked in Front of Fire Hydrant Defendant and Passenger Acting Nervous	Unusual actions by the Defendant including his physical movements
Interaction with Police	Admits to having drugs for personal use	Voluntarily turning over the marijuana and emptying contents of his pockets
Court's Holding	Unlawful Exit Order	Lawful Exit Order

If an initial stop and frisk of a person was unlawful, does that taint the subsequent search of a vehicle if it was consensual?

Commonwealth v Henry Arias, 81 Mass. App. Ct. 342 (2012)
Background: On May 29, 2008, a MBTA Sergeant received information that one of the contract employees, known as "Arias" carried a gun to work in the small of his back. Arias allegedly also kept a second gun in his BMW which he drove to work. After identifying Arias, the MBTA Sergeant approached him in the parking lot and explained he had information that an employee was carrying a gun to work. The Sergeant conducted a pat/frisk on Arias and did not find a firearm. Following the pat/ frisk, the Sergeant asked Arias if he could search his vehicle. Arias consented and the Sergeant recovered a firearm. Arias was arrested and argued that there was no probable cause to search him because the information the Sergeant had received was not from a **reliable source**.

Conclusion: The initial search of Arias was unlawful because it was not based on **reliable information.** The Sergeant had no information to support that the tip he received was valid and therefore there was no probable cause to search Arias. Without probable cause to conduct a pat/frisk on Arias, the subsequent motor vehicle search was unlawful, regardless of whether Arias consented. Since there was no probable cause, the firearm was suppressed. If the police searched the vehicle, hours later based on new information, the search of the motor vehicle may have been upheld as lawful. **If the initial stop is not valid, consent to search does not validate the search.**

2. Frisks

Can officers pat/frisk individuals whom they find suspicious, in a high crime area, without any additional information?

Commonwealth v Narcisse, 457 Mass. App. Ct. 1 (2010)
Background: The police had received information that there may be retaliatory action as a result of a shooting the prior evening. The identity of the individuals involved in the shooting was not known and no description was provided. While on patrol, the police observed two men whom they did not recognize, walking in the area. The police approached the men and asked what they were doing. The men responded that they had just left a store. The police found the men's response implausible since there were no stores in close proximity. The police detained the men, conducted a pat/frisk, and recovered a loaded .22 caliber firearm from the front pocket of the men's jackets. The men challenged the pat/frisk arguing that the police lacked probable cause.

Conclusion: The pat/frisk was not lawful because officers **lacked reasonable suspicion** that the men were involved in criminal activity or were armed and dangerous. Although the court acknowledged that "police officers are free to approach any citizen and ask questions, the court stated that unless such an encounter produces a reasonable suspicion of criminal activity, a pat-down search cannot be justified, and what occurred in that case did not come close to the threshold." ***United States v. Gray,*** 213 F.3d 998 (8th Cir. 2000). **A stop is valid if the investigatory stop is lawful. If the police reasonably suspect that the person stopped is armed and dangerous, then the police are justified in conducting a pat/frisk.**

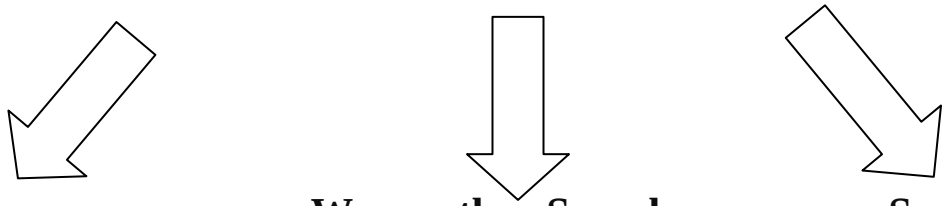
Did the officers exceed the scope of the frisk by looking under the defendant's shirt?

Commonwealth v Flemming, 76 Mass. App. Ct. 632 (2010)

Background: While on patrol in Dorchester, officers received information that there were shots fired in the area of Draper Street. The officers responded to a specific address on Draper Street after receiving a mobile data transmission (hereinafter referred to as "MDT") that an individual was being chased by four people. Since the officers were familiar with the Draper Street address from a prior incident, they suspected that the defendant, Flemming, may be involved. When the officers initially arrived at the address, they were unable to locate anyone. A few hours later they observed Flemming walking on the sidewalk and they stopped to question him. During the exchange, the officers observed a bulge sticking from Fleming's waistband. The officers lifted Fleming's T-shirt and found a loaded revolver without conducting a pat/frisk. Flemming filed a motion to suppress challenging the officers' pat/frisk.

Conclusion: The evidence in this case was suppressed because of **how** the officers conducted the frisk. In assessing the validity of the pat/frisk, the court first examined whether the officers' actions were justified to stop and frisk Flemming. The court determined that the officers' threshold inquiry and decision to frisk Flemming were reasonable in light of the circumstances (i.e. **high crime area, reputation of the defendant's criminal activity, report of shots being fired and the officers' observation that defendant had a bulge in his shirt area).** ***Commonwealth v. Silva***, 366 Mass. 402 , 405 (1974). However, the court concluded that the officers exceeded the scope of the frisk when they lifted Flemming's shirt rather than pat/frisk the exterior of his clothing. Since there was no evidence to suggest that Flemming was a threat or was non-compliant, the officers should not have deviated from the normal procedure of patting the exterior of Flemming's clothing. As a result the motion to suppress was granted and the gun that was seized from Flemming was suppressed.

B. Search and Seizure



Non Searches **Warrantless Searches** **Search Warrant**

1. Non Searches

a. Drug Detection Dogs

In the past the Supreme Court has found that police dogs sniffing luggage at an airport terminal or the exterior of the vehicle during a motor vehicle stop is not a violation of the 4th Amendment because it is minimally intrusive. In October 2012, the United States Supreme Court will revisit the validity of drug detection dogs that were appealed from two cases originating out of Florida.

Does a police dog sniffing the exterior of a private home for illegal narcotics violate the 4th Amendment?

Florida v Jardines, 73 So. 3d 34 (Fla 2011)

Background: On November 3, 2006, the Miami police received a tip that the defendant, Jardines, was growing marijuana inside his home. The police monitored the residence for over a month and observed no unusual activity other than a window unit air conditioner continually running. The police brought a drug detection dog to Jardines' home. The dog walked around the residence and alerted the handler to the scent of contraband. The officers approached the residence and smelled marijuana. At that point, the police applied for a search warrant. The defendant was arrested and charged once the police located marijuana inside the home. The defendant challenged the arrest and argued that that the dog sniffing the exterior of his home was a search.

Conclusion: The court held that the officers' search of Jardines' private residence based on the police dog's sniff test was unlawful and violated the 4th Amendment.

Does a dog sniffing the exterior of a vehicle and alerting an officer, to the presence of contraband qualify as probable cause? If so, can officers search the inside of the vehicle pursuant to the "automobile exception"?

Florida v Harris,71 So. 3d 756 (Fla 2011)

Background: On June 24, 2006, the police stopped a motor vehicle belonging to the defendant, Harris, because it had expired tags. When the officer approached Harris on the driver's side, he observed Harris to be "nervous, breathing rapidly and unable to sit still." Based on the officer's experience and observations, he asked Harris if he would consent to a search of his motor vehicle. Harris refused to allow the officer to search his vehicle. The officer deployed his drug detection dog to sniff the exterior of the vehicle. The dog alerted the officer to the driver's side door handle. The officer subsequently recovered 200 pseudophedrine pills along with other equipment used in making methamphetamines from the **inside** of Harris' vehicle. Harris was arrested and challenged the use of the drug detection dog.

Conclusion: The court held that the officer lacked probable cause to search the interior cab of the vehicle without a warrant. Searching the vehicle based on the "sniff test" alone in this case failed because there was no indication that the drug detection canine was reliable. The court held that admitting **only** the records of the dog's training and certification to detect narcotics was insufficient to prove the dog was reliable. The "sniff test" in this case failed to provide the officer with probable cause to search the inside of the vehicle without a warrant. In the past, the courts have determined that it is lawful for police to use drug detection dogs to sniff the exterior of luggage or the outside of a vehicle during a traffic stop because the "sniff test" was minimally intrusive and did not impact a person's privacy rights. The Harris case raises two issues. The first issue concerns the reliability of the drug detection dog and attempts to establish what the requirements will be to verify the dog's reliability. The second issue is whether the drug detection dog's alert provided probable cause for the officer to search the inside of the vehicle.

Does a dog sniffing the exterior of the vehicle amount to a search?

United States v. Sharp, No. 10-6127, 2012 U.S. App. (6th Cir. Decided July 27, 2012)

Background: Officers stopped the defendant, Sharp, and arrested him on an unrelated warrant. The officer had his drug detection dog with him. The dog was alerted to walk around the vehicle and sniff for drugs. Then the dog, unprovoked, jumped through the driver's open window and pointed with its nose that it detected drugs contained within a shaving kit on the passenger's seat. The

police recovered drugs and Sharp was arrested. Sharp challenged the search alleging it was unlawful because the drug detection dog jumped through the window.

Conclusion: The court examined whether the search of the interior of the vehicle was lawful. Specifically, the court analyzed whether the police had encouraged the dog to jump through the window of the vehicle through training. The court held that in this case there was no evidence that the police trained or encouraged the dog to jump through the window. Rather it appeared that the dog instinctively jumped into Sharp's vehicle because it smelled drugs, not because it was trained to jump into the vehicle or encouraged to do so by the police.

2. Warrantless Searches

a. Search Incident to an Arrest
b. Consent
c. Plain view
d. Automobile Exception
e. Exigent Circumstances
f. Protective Sweep
g. Administrative Searches (including Schools, prisoners, public safety concerns)

a. Search Incident to Arrest

Can officers search the text message folder of a person's cell phone without a warrant after the person is arrested?

People v Diaz, 51 Cal.4th 84 (2011)

Background: The police arrested the defendant, Diaz after they purchased drugs from him. The police transported Diaz to the station and interrogated him. During the interrogation, Diaz denied selling ecstasy to an undercover officer. The police then searched the text message file of Diaz's seized cell phone and discovered incriminating evidence. The police charged Diaz with distribution and he filed a motion to suppress claiming that the police had violated his fourth Amendment rights by searching his cell phone without a warrant.

Conclusion: The search and seizure of Diaz's cell phone was lawful because the police did not search the phone until Diaz was arrested. Since the phone was searched pursuant to Diaz's arrest, the police did not need to apply for a warrant. **Despite the ruling in this case, the court cautioned with the increase of smart phone usage, the rules on searching what content can be searched within a phone are ambiguous and fact specific.**

Are cell phones and mobile devices considered containers?

Hawkins v State, 307 Ga. App. Ct. 253 (2010)

Background: The police arrested the defendant, Hawkins, for violating the controlled substances act in Georgia after the police arranged an undercover buy. Hawkins selected a location to meet the officer so he could purchase illegal drugs. When Hawkins arrived at the location, the officer observed Hawkins entering data into her phone. The officer received a text contemporaneously from Hawkins indicating that she had arrived at the location. The officer arrested Hawkins, searched her vehicle and seized her phone that was within her purse. The officer also retrieved the text messages from Hawkins' cell phone that they had exchanged regarding the purchase of drugs. Hawkins appealed her conviction and argued that the officer had no authority to search her cell phone.

Conclusion: The search of the phone's text messages was lawful because the phone was seized when the police arrested Hawkins. Furthermore, the police could legally search the text messages that were exchanged between the officer and Hawkins because the messages were integral in arranging the undercover buy. The court determined that in this case, a phone is comparable to a container and "can be opened and searched for electronic data, similar to a traditional container that can be opened to search for tangible objects of evidence," without requiring a warrant if the police establish probable cause. Although the court equated phones to containers, it limited what the police could search because smart phones contain private information that may not be connected to the transaction. Specifically, the court clarified that the "search must be limited as much as is reasonably practicable by the object of the search." The court stated that an officer may not conduct a "fishing expedition" and sift through all of the data stored in the cell phone. For example, in this case, the officers were restricted to searching text messages affiliated with the undercover buy and therefore, there was no need for officers to scan photos or audio files or Internet browsing history data stored within the phone. **Cell phones have been designated electronic containers that can be searched.**

Commonwealth v Demetrius Phiffer and Commonwealth v Christopher Berry, (2012)

NOTE: In September 2012, the Massachusetts Supreme Judicial Court heard oral arguments as to whether a warrant is required for a non-contemporaneous search at a police station of a cell phone seized from a person incident to his prior arrest. The issue before the court in above case is whether an officer can use a cell phone recovered from a drug transaction to further investigate the crime?

When there is a valid arrest, can officer dial last number contained within the phone after the arrest? Is there a time frame for further investigation?

b. Consent

Did the officer exceed the scope of the search when he pat/frisked the defendant's groin area? Second, did the officer's comments to the defendant assure that the search was consensual?

United States v Russell, 664 F.3d 1279 (9th Circuit 2012)

Background: Officer Bruch from the Seattle Police was assigned as a task force officer with the Drug Enforcement Administration group at the Airport. On August 12, 2010, an Airlines Agent contacted Officer Bruch because a passenger who was described as a black male wearing a leather jacket and a large necklace, had paid cash for a last-minute, one-way ticket to Anchorage, Alaska. The agent identified the passenger as Russell and noted that he was traveling alone and had not checked any luggage. Based on the information, Officer Bruch suspected Russell might be a drug courier. Additionally, Officer Bruch learned that Russell had a history of drug and firearm-related convictions, and had previously been implicated in a prior drug investigation in Alaska. When Officer Bruch approached Russell, he displayed his badge and identified himself as a police officer. Officer Bruch informed Russell that he was "free to go and he wasn't under arrest." Russell permitted Officer Bruch to search his bag and also consented to a pat/frisk. Officer Bruch conducted a pat/frisk over the clothing and felt a hard object in the groin object which was later determined to be drugs.

Conclusion: The court determined that Russell's consent was voluntary based on the factors listed below:

Factors for Determining whether Consent was Voluntary

(1) Was the defendant in custody?
(2) Did the officer have a weapon drawn before consent was given?
(3) Did the officer advise the defendant of his Miranda warnings?
(4) Was defendant informed did not have to consent to the search?
(5) Was defendant told a search warrant would be obtained if he did not consent?

The court concluded that Russell voluntarily consented to the search. At the time, Officer Bruch searched Russell he was not in custody and was free to go. Officer Bruch did not use any force or draw his gun before Russell gave his consent. Since Officer Bruch told Russell he was free to go and he was not under arrest, no Miranda warnings were given. There was no evidence to suggest that Officer Bruch threatened or coerced Russell in order to get him to consent. Based on the circumstances surrounding the search, the court held Russell voluntarily consented. The court further stated that consent does not become involuntarily if all of these factors are not satisfied. The court also addressed the scope of the search and concluded that it was reasonable because drugs are known to be found in the groin area. In viewing the above factors, the court held that Officer Bruch's pat/frisk of Russell in the groin area was lawful. **Bottom line is that NO warrant was required since this was a consensual search and Russell was free to go during the search.**

Can a host provide consent for the police to search a guest's belongings?

Commonwealth v Magri, 968 N.E. 2md 876 (2012)
Background: The city of Pittsfield was experiencing a string of robberies that were occurring in residences, unattended vehicles, and businesses. As a result of the robberies, the Pittsfield police conducted an investigation and concluded that the defendant, Magri was a potential suspect. Magri was ultimately arrested and the police proceeded to gather evidence from the apartment where he was staying. Without securing a search warrant, the police spoke with the apartment tenant who provided oral and written consent for the police to enter and search the room where Magri was staying. As a result of the search, the police seized the bags of evidence from Magri's room that linked him to several of the robberies in Pittsfield. Magri filed a motion to suppress and argued that the tenant lacked authority to allow police to search the apartment where he was staying.

Conclusion: The court agreed with Magri's argument and concluded Magri had a reasonable expectation of privacy in both his back pack and the shopping bags that were stored in the bedroom of the host where he was an overnight guest. The court concluded that the **host lacked actual authority to consent** to search of the defendant's closed back pack and shopping bag.

c. Plain View

Can officers seize clothes of a defendant receiving treatment at a hospital, if the clothes are in plain view?

Commonwealth v Fortuna, 80 Mass. App. Ct. 45 (2011)

Background: The defendant, Fortuna, sustained a gunshot wound in his lower calf or ankle area and informed police that someone driving by in a vehicle shot him. The police began to question the validity of Fortuna's story because they had observed black soot or gunshot residue around Fortuna's wound and his clothing. Based on their observations, the police suspected that Fortuna's wounds were self inflicted. In order to confirm their suspicions, the police asked hospital personnel to turn over the clothing they had removed from Fortuna in the course of treating him. The police did not obtain a warrant before taking Fortuna's clothing and Fortuna did not expressly consent or object to the seizure. As a result of their investigation, the police charged Fortuna with misleading a police officer with intent to impede or interfere with an investigation, G.L. c. 268, § 13B, and making a false report of a crime, M. G.L. c. 269, § 13A. Fortuna appealed his conviction and argued that the motion to suppress evidence seized from him in the hospital should have been granted because it violated his fourth amendment rights.

Conclusion: The court held that the police's seizure of Fortuna's clothes while at the hospital was not a violation of the fourth amendment because Fortuna had no expectation to privacy regarding clothing ripped off him while hospital personnel administered medical attention. Furthermore, Fortuna did not object to the police taking his clothing for testing. **The court held that according to the "plain view" doctrine, it was reasonable for the police to seize the clothing as evidence because they were investigating a shooting.**

Do officers need a search warrant to seize clothes of a defendant receiving treatment at a hospital?

***Commonwealth v Williams*,** 76 Mass. App. Ct. 489 (2010)

Background: The defendant, Williams was being treated at Boston Medical Center for stab wounds. Although Williams refused to speak with the police about the stabbing, the police were able to seize Williams' clothing that hospital staff had placed inside a bag. The police subsequently tested the blood stains that were on Williams' clothing over his objection. As the police were removing the clothes from the bag, a clear plastic bag containing a yellowish rock like substance believed to be crack cocaine fell to the floor. Williams was arrested and appealed arguing that the police violated his fourth amendment rights when they seized his clothes. The Commonwealth countered that the clothing can be seized in furtherance of a criminal investigation and that it needed to be tested immediately to preserve any DNA evidence.

Conclusion: The court held that the police's seizure of the defendant's clothes while at the hospital was a violation of his fourth amendment rights because the police took the clothes over the defendant's objection. According to the facts, there were no exigent circumstances that prevented the police from getting a warrant. Williams did not forfeit his possessory rights when he became a hospital patient and the hospital lacked authority to turn his clothes over to police without his authorization because the hospital did not jointly possess the clothing. **While police can seize items to assist in criminal investigations, there were no exigent circumstances that would prevent the police from obtaining a warrant for Williams' clothing.**

d. Automobile Exception

Do officers have authority to search the complete interior of a vehicle if the occupants are not under arrest and there is no probable cause for a protective sweep?

United States v McCraney, 674 F. 3d at 618-19 (2012)

Background: The defendants, McCraney and Ammons, were driving in a car with their high beam lights on. An officer traveling in the opposite direction made a U turn and followed the defendants. While driving behind the buick, the officer observed McCraney and Ammons bending down towards the seat. The officer stopped the vehicle and asked Ammons to provide a license and registration. When Ammons was unable to produce a valid license, the officer called for back-up. While waiting for assistance, Ammons attempted to exit the vehicle twice. The officer verified that Ammons did not have a valid license and McCraney's license was also suspended.

The officer did not arrest Ammons and McCraney but ordered them out of the car. The officer conducted a pat/frisk and did not recover any contraband. Before allowing McCraney and Ammons to return to the vehicle, the officer searched the glove compartment and the interior of the vehicle. The officer recovered a firearm under the driver's seat of the vehicle and arrested McCraney and Ammons. McCraney and Ammons argued that the officer lacked reasonable suspicion to conduct a protective sweep of interior of the vehicle

Conclusion: The court held that the stop was justified because the officer observed a traffic violation. Furthermore, the officer was reasonable in issuing an exit order and conducting a pat/frisk when he observed McCraney and Ammons making furtive movements. However, the court concluded that the officer lacked reasonable suspicion to search under the driver's seat. The court suppressed the recovery of the firearm because the officer was not justified searching the interior of the vehicle. The court concluded that the discovery of the firearm did not fall under the search incident to arrest exception because McCraney and Ammons were not arrested until after it was found.

(i) Trunk Search

Can officers who conduct a motor vehicle stop and confirm the driver does not have license, search the vehicle's trunk and glove compartment?

Commonwealth v. Degray, 71 Mass. App. Ct. 122 (2010)

Background: An officer stopped a vehicle for the traffic violation because the car's headlight was out. When the officer approached the vehicle and spoke with the occupants, he detected an odor of **burnt** marijuana. The driver and the passenger admitted to smoking marijuana. When the driver failed to produce a valid license, the officer ordered the driver and passenger out of the vehicle. The officer conducted a pat/frisk of the driver and the passenger and searched the inside of the vehicle that was accessible to both of them. The officer recovered two marijuana cigarettes and marijuana remnants inside the glove compartment. After finding the marijuana cigarettes, the officer searched the trunk and located marijuana and ectasy pills inside a compartment in the trunk. The driver was charged and filed a motion to suppress arguing that the officer lacked probable cause to search the trunk. The judge allowed the motion stating that smelling burnt marijuana fails to support an "inference that the occupants were transporting marijuana in the trunk." The Commonwealth appealed the findings of the district court judge.

Conclusion: The court held that the officer in **this case had probable cause to search the trunk of the vehicle because there were other factors in addition to the odor of burnt marijuana that supported a connection between the contraband and the vehicle**. There is no dispute that the stop of the vehicle was justified. Additionally, the officer's exit order was also valid when the driver failed to produce the license. The court also concluded that the search of the glove compartment was lawful because the officers smelled **burnt** marijuana and found marijuana remnants suggesting that the driver and passengers recently had access to contraband. The court further held that the officers had **probable cause to search the trunk in this case** because of the **additional factors** which included the driver's admission that he had been smoking marijuana in the vehicle and the recovery of the burnt marijuana. Based on the totality of the circumstances, the court determined that there was a connection between the vehicle and the contraband. Although the lower court allowed the defendant's motion, the Appellate court reversed the lower court's decision distinguishing this case from *Garden.* **While the smell of burnt marijuana alone, does not give rise to probable cause to search a trunk, the court in this case held that the additional factors - the two marijuana cigarettes and marijuana remnants found in the car, established a connection between contraband and the vehicle, giving the officer probable cause to search the trunk.** ***Commonwealth v. Garden***, 451 Mass. App. Ct. 43, (2008). NOTE: *Commonwealth v Degray* is currently good law despite the 2008 ballot initiative decriminalizing marijuana.

(ii) Glove Compartment Search

Did officers exceed authority when they searched the inside of the defendant's vehicle?

Commonwealth v Cruz- Rivera, 76 Mass.App.Ct. 14, (2009)

Background: Officers conducted a motor vehicle stop after a black Mercedes pulled out in front of their marked cruiser almost striking them. As the officers approached the vehicle, they observed the driver bend down and place something in the center console. The officers ordered the driver out of the car due to a safety concern. While the officers were conducting a pat/frisk of the defendant, he repeatedly moved his right hand from the hood of the vehicle to his right side. Even though the officers did not arrest the defendant at this point, they handcuffed him so they could complete their search. One of the officers recognized that the defendant from a photograph that was distributed in the Lowell police department with the caption "wanted for question," as a potential suspect in a drive by shooting. The officer recalled that the defendant was previously arrested for drug and firearms offenses. Based on safety concerns, the officers conducted a pat/frisk. The officers then searched the vehicle and recovered a pill bottle within the center console. The pill bottled contained twelve glassine bags of cocaine. The officer then opened everything

inside the center console because he was concerned that weapons could be hidden. The officer testified that he learned from a recent training that suspects are minimizing the size of weapons and concealing them in containers as small as pill bottles.

Conclusion: The court concluded that the officer exceeded limits of any constitutionally permissive weapons search when he opened a pill bottle that was found within the center console of the vehicle. Although the officer testified that he had training about concealment of weapons in small spaces, the court found that there, "there was no evidence that pill-bottle-sized weapons had "proliferated" nor was there evidence that the defendant had a specific history of using tiny weapons." The court further held that it seemed implausible that the defendant would returned to his vehicle after just being released by police to use a weapon that was "smaller than four and one-half inches by one and three-fourths inches," upon two armed police officers.

e. Exigent Circumstances

Do threats to a school qualify as exigent circumstances that justify police entering a private residence?

Ryburn v Huff, 132 S. Ct. 987 (2012)
Background: The police learned from school officials that there was a rumor circulating that a student had written a letter threatening to "shoot up" the school. As a result of this information, the police investigated the student's history and learned that he was the victim of bullying and frequently missed school. Based on their training with school violence, the police found it was necessary to speak with the student. Upon arriving at the student's residence, the police phoned the student's parents. Initially, no one answered the telephone but eventually the student and his mother came out of the house. The police questioned the student and asked whether there were guns inside. At this point, the mother ran inside and the police followed her because they were concerned for their safety. The student and his parents were not searched and neither was the home. The police determined that the allegations were not valid. The student's family sued the police for violating their fourth amendment when they entered the home without authority.

Conclusion: The court held that in light of the circumstances, the warrantless entry into the home was justified because the police had concerns that violence was imminent. The court also concluded that the officers were shielded from personal liability because their conduct at the time was reasonable in light of the information they had received coupled with the reaction of the student's mother. The court reaffirmed the finding in the ***Graham*** case which stated that this case "**must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" and that "[t]he calculus of reasonableness**

must embody allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving." ***Graham*** **v.** ***Connor,*** **490 U. S. 386, 396-397 (1989)**

Do officers need a warrant to enter a private home or search a defendant's motor vehicle if there are exigent circumstances?

Commonwealth v. Entwistle, 463 Mass. 205, Mass, (2012)

Background: The defendant, Entwistle fled the country after he murdered his wife and daughter. While Entwistle was out of the country, his mother-in-law contacted police because she could not locate her daughter. Entwistle's mother-in-law became even more concerned when she learned that her daughter had failed to meet friends for dinner and was not answering any phone calls. As a result the police went to the Entwistle home for a person check. While at the Entwistle residence, the police spoke with friends of the couple who explained that it was very unusual for the Entwistles to miss a prearranged dinner and to leave the dog inside the house alone. The police walked around the exterior of the home and looked through the windows of the garage. Although the house appeared "closed up," the police observed lights and television on and heard a dog barking. The police entered the house without a warrant because they were believed the Entwistles may be in need of aid. Although the police searched the entire house including the master bedroom, they did not find the Entwistles. When friends and family of the Entwistles were still unable to reach the couple after a few days, the police decided to reenter the home. During the second entry, the police discovered the bodies of Entwistle's wife and baby inside the master bedroom. The police charged Entwistle and he was convicted. Entwistle appealed the conviction alleging that the police's two warrantless entries into his home and the seizure of his vehicle's VIN number were not lawful.

Conclusion: The police's two warrantless entries into the Entwistle's home were lawful under the **emergency aid exception**. The court also held that the police were justified in retrieving Entwistle's VIN number in an effort to locate the couple. Before reaching its conclusion, the court evaluated whether the police were justified in entering the Entwistle home on two occasions without a warrant. The first time entry into the home was lawful because there was concern that the Entwistles may be in need of aid. During this entry, the police limited the scope of the search by checking to see if anyone was inside the home and needed assistance. In regards to the second search, the court concluded that based on the totality of the circumstances the police were justified in believing that an emergency existed. A warrantless government search of a home is presumptively unreasonable under the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights unless there is a situation involving "emergency aid," which permits the police to enter a home without a warrant when they have an objectively reasonable basis to believe that there may be someone inside who is injured or in imminent danger of physical harm." ***Mincey*** **v** ***Arizona,*** 437 U.S. 385, 392 (1978).

"**Officers do not need ironclad proof of a likely serious, life-threatening' injury to invoke the emergency aid exception."** ***Michigan v. Fisher,*** 130 S. Ct. 546, 549 (2009)

f. Protective Sweep

Were officers justified in conducting a protective sweep based on concern for their safety?

United States v Rebecca Jones and Kipling Jones, 667 F.3d 477 C.A.4 (N.C.) (2012)

Background: The hospital was treating a victim who had suffered severe burns due to a meth lab explosion. The police received information from the victim's son that the victim had been over at the defendants' home prior to the accident. After learning the location of the residence, the police drove there and observed a number of vehicles parked outside. While at the residence, the police discovered that one the defendants who owned the house had an outstanding warrant. As a result of the warrant, the police approached the house to arrest the defendant. Since the police knew from past experience that the defendants were investigated for drug dealing, they decided to conduct a protective sweep. The police entered the house with their guns drawn because they did not know how many people were inside. Although the police did not observe any illegal drug activity, they did observe drug paraphernalia in "plain view." The police did apply for a search warrant and recovered evidence of drug distribution. The defendants were indicted on federal drug charges. The defendants filed a motion challenging the police's authority to conduct a protective sweep.

Conclusion: The court relied upon the analysis detailed in the ***Maryland v Buie***, where it found that the issue is "not the threat posed by the arrestee, [but] the safety threat posed by the house, or more properly by unseen third parties in the house." The court evaluated all the factors surrounding the police's reasons for conducting a protective sweep and concluded that the "number of the vehicles present at the residence, along with the prior knowledge that meth users frequented the residence was sufficient basis for the police to conduct a protective sweep for their own safety.

Were officers justified in conducting a protective sweep based on concern for their safety?

Commonwealth v McCollum, 975 N.E. 2d 937 (2011)

Background: The police blocked the defendant, Williams' vehicle with their cruisers after receiving information that Williams may have stolen a car. Aside from the stolen car report, the police knew that Williams had outstanding warrants. Williams crashed the vehicle he was driving into the cruisers and jumped out. The police chased Williams and observed him discard plastic bags of crack/cocaine on the ground. The police continued to pursue Williams into an apartment complex and asked the tenants for consent to search the apartments. The police found Williams lying on a bed and pretending to be asleep inside Apartment 12. When the police observed a gun holster inside a closet, they asked Williams whether there was a firearm in the apartment and Williams said yes. The police conducted a protective sweep and recovered a firearm inside the closet. The police arrested Williams and secured a search warrant for the apartment that belonged to Alan McCollum. Based on the search, the police also charged McCollum with unlawful possession of a firearm and a variety of drug offenses. Williams and McCollum filed motions to suppress the evidence seized during the protective sweep.

Conclusion: The police's protective sweep was justified because Williams fled from the police and assaulted them with his vehicle. The court held that the police's warrantless entry into a third party residence was lawful based on exigent circumstances. The police were not required to issue Williams his Miranda Warnings before questioning him about location of firearm because there was a threat to public safety. The court also addressed whether McCollum, the owner of the apartment could be charged with constructive possession of controlled substances and unlawful possession. The court reversed the convictions pertaining to McCollum and remanded the case to Superior Court. The conviction against Williams was upheld.

Factors for Entering Residence Without a Warrant

1. **Crime was violent and suspect could be armed and dangerous**
2. **Probable cause suspect committed a felony**
3. **Entry into the apartment was made peacefully**
4. **Likely that evidence would be destroyed**
5. **Likely that suspect would escape**
6. **Officers could face harm if delayed in searching apartment**

3. Searches Requiring Warrants

a. Physical Search of Body

Can correctional facilities conduct a strip search?

Florence v Burlington, 132 S. Ct. 1510 (2012)

Background: The defendant was arrested on a traffic stop after it was discovered that he had a bench warrant. When the defendant was brought to the correctional facilities, he had to shower with a delousing agent and he was checked for scars and contraband. During the search for contraband, the defendant was required to open his mouth, hold out his arms, turn around and lift his genitals. ALL inmates were subject to the same screening upon entering any jail or correctional facility. The defendant appealed the "strip search" stating it violated his fourth amendment rights because it was intrusive on his privacy. Furthermore, he argued that inmates charged with minor offenses should not be subjected to an extensive screening.

Conclusion: The court recognized that it is challenging for correctional facilities to balance the security and safety of the facility with the privacy of an individual. Furthermore, it would be burdensome for correctional facilities to separate inmates or predict who may have contraband based on the charges alone. The court held that since ALL inmates were subject to strip searching, it was not a violation of the defendant's fourth amendment rights. Despite this ruling from the US Supreme Court, Massachusetts is unaffected because strip searches are prohibited in Massachusetts under Article 14. **Strip Searches and Visual Cavity Searches are only permissible in Massachusetts if there is probable cause. Manual Body Cavity Searches in Massachusetts are only permissible with a warrant. See *Com. v. Prophete, Com. v. Thomas,* and *Com. v. Ramirez*.**

Did officers exceed the scope of search when they lifted the defendant's search?

Commonwealth v Morales, 132 S. Ct. 1510 (2012):

Background: The officers pulled the defendant, Morales' over because they suspected he was selling heroin out of his vehicle. After the officers observed Morales leaning over to his right and placing his hands behind and underneath his torso, they conducted an exterior pat down outside of his shorts and felt a lump between Morales' buttocks. The officers then walked Morales to a more secluded area, and pulled his shorts at the waistband. The officers observed a clear plastic bag protruding from Morales' buttocks.

Morales struggled with officers as they placed him in handcuffs and removed the bag from his buttocks. The officers argued that the search was valid because it was incident to arrest.

Conclusion: The court held that a search involving inspections of areas like the buttocks are of a highly personal nature and should be conducted in a manner to prevent minimum intrusiveness on someone's privacy. The search should have been conducted in a private room since no exigent circumstances existed here.

b. Search Warrants for Homes

Is a reasonable inference by police sufficient to establish a nexus that the suspect is a drug dealer and sells drugs from a residence in order to apply for a search warrant?

Commonwealth v. Jose M. Escalera, 79 Mass. App. Ct. 262 (2011)
Background: The police were working with a confidential informant who informed that he knew a heroin dealer in Brockton that used two (2) different cars to prearrange drug purchases. Each time the confidential informant (hereinafter referred to as "CI") would arrange to purchase drugs from the defendant, Escalera, he would meet the CI at a specific location and drive with the CI to a house where he would enter through the rear entrance. The police observed Escalera leaving and returning to this house multiple times after arranging drug transactions. As a result of the pattern of activity, the police applied for a search warrant of the house and recovered drugs. Escalera was arrested and charged. The defendant filed a motion to suppress the evidence arguing that the affidavit attached to the search warrant failed to establish a "nexus" with his residence and failed to establish probable cause.

Conclusion: The court held that the police had probable cause to apply for search the residence based on the defendant's reputation as a known drug dealer and the observations they made during the prearranged undercover buys. Furthermore the court ruled that the defendant did not have a reasonable expectation of privacy to the basement where the landlord also had access. When determining whether there is a nexus, reading an affidavit in its entirety may assist in determining whether a nexus can be found." The nexus may be found in the type of crime, the nature of the missing items, the extent of the suspect's opportunity for concealment, and normal inferences as to where a criminal would be likely to hide' the drugs he sells." ***Commonwealth v. O'Day***, 440 Mass. 296 , 302 (2003), quoting from ***Commonwealth v. Cinelli***, 389 Mass. 197 , 213, cert. denied, 484 U.S. 860 (1983). See ***Commonwealth v. Blake***, 413 Mass. 823 , 827 (1992).

Can an officer's specialized knowledge of drug distribution suffice to establish probable cause for a search warrant?

Commonwealth v David Lima, 76 Mass. App. Ct. 1129 (2010)

Background: The police applied for a search warrant for a residence where they suspected drug dealing. However, the affidavit attached to the search warrant failed to detail the specific reasons other than the affiant's specialized knowledge of drug distribution operations as to why the police believed drugs would be found at the defendant's residence. The affidavit attached to the search warrant relied upon the affiant's past experience and training, and detailed how it was common for narcotics organizations to maintain one empty dwelling for the sole purpose of drug storage and distribution, and another, separate dwelling to house the proceeds and records of the drug operation. As a result the police executed a search warrant and recovered evidence connecting the defendant to drug distribution. The defendant filed a motion to suppress the evidence claiming that the search warrant and affidavit lacked sufficient nexus between the defendant and criminal activity.

Conclusion: The court held that when evaluating an affidavit for probable cause, the affiant's specialized experience must be considered. For example, an officer with specialized experience is permitted to draw inferences from facts that an inexperienced person might not draw from those facts, *Commonwealth v. Santiago,* 66 Mass. App. Ct. 515, 521 (2006). As a result of these inferences, the court found sufficient indirect evidence supporting the affiant's conclusion that records, ledgers or proceeds were more than likely contained in the dwelling and that there was sufficient indirect evidence to warrant a probable cause finding, and that those factors collectively provide the necessary "specific information" providing "a sufficient nexus between the defendant's drug-selling activity [in the stash house on 29 Goddard Road] and his residence to establish probable cause to search the residence [for money and records]." *Commonwealth v. Pina,* 453 Mass. 438, 441 (2009).

Can an officer be liable if a search warrant is faulty?

Messerschimdt v Millender*,* 132 S. Ct. 1235, 2012

Background: A victim, identified as Kelly, reported to police that her boyfriend, Jay Bowen, threatened to throw her over her apartment railing and as she escaped in her car, Bowen fired shots from a sawed off shotgun. Kelly also informed police that Bowen was a member of a gang that was associated with the Millender's residence. As a result of this information, Officer Messerschmidt

applied for two search warrants asking for any and all firearms or gang related material. Officer Messerschmidt recovered a shotgun from the Millender's residence. The Millenders brought suit claiming that the officer's affidavit attached to the search warrant was too broad and violated their fourth amendment rights.

Conclusion: The court held it was reasonable for the officer to request any and all firearms or gang related items when executing a search warrant. Furthermore, the court held that even if the affidavit was erroneous, the officer was entitled to qualified immunity because he was acting within the scope of his employment.

c. Technology (Search Warrants for Mobile Devices, Computers and GPS Devices)

Do Police Need Search Warrants if Using GPS tracking Devices on Motor Vehicles?

U.S. v Antoine Jones, 132 S. Ct.945 (2012)
Background: The police were working with the FBI because they suspected that the defendant, Jones was trafficking drugs. As a result of their investigation, the police applied for a warrant to attach a Global Positioning- System (GPS) tracking device to his vehicle for a period of ten days in the District of Columbia. However the police installed the GPS on the 11th day in Maryland and the GPS was in place for 28 days. The police arrested Jones and his wife for drug trafficking. The defendants filed a motion to suppress arguing that their fourth amendment rights were violated.

Conclusion: The court held that the attachment of the GPS device on the vehicle to monitor its movements constituted a search under the Fourth Amendment because it determined that the placement of the device on the vehicle was a trespass on Jones' personal property. While the court agreed that attaching a GPS tracking device to a vehicle is a search, it refused to consider whether such a search is reasonable.

Commonwealth v Connolly, 454 Mass. App. Ct. 808 (2009)
Background: The police were investigating the defendant for more than one year because they suspected he was a drug dealer. As part of their investigation, the police applied for a search warrant application to place a GPS monitoring device on the defendant's minivan for **fifteen days**. The warrant was issued for a definitive period of time and as a result of the information received from the device, the police were able to search the vehicle and arrest the defendant on drug charges.

Conclusion: The court held that attaching a GPS tracking device was a seizure under the fourth amendment and therefore a warrant was needed in this case. The warrant for the GPS tracking device was valid in this case because it was limited to the period of fifteen days which is in compliance with the SJC's ruling. **GPS tracking warrants are issued under the common-law authority of the courts, and the monitoring period must be no longer than 15 days from the date the warrant was issued.**

C. Miranda and Interrogation

Miranda Warnings Required

1. Custody
   Factors Establishing Custody
   a. Place of interrogation
   b. Whether the officers have conveyed to the person being questioned that they are a suspect
   c. Nature of Interrogation
   d. Whether person was free to leave after questioning
2. Arrested

Interrogation after Miranda Warnings

1. If defendant invokes silence, then police cannot interrogate about current crime.
2. If defendant invokes right to counsel, then interrogation ends.

Did the fact that defendant shook his head indicate he invoked his right to remain silent under his Miranda rights and if so, should his subsequent statements be suppressed?

Commonwealth v Clarke, 461 Mass. 336 (2012)
Background: Two MBTA police officers arrested the defendant, Clarke, for indecent assault and battery which had occurred a few weeks prior. The officers brought Clarke to the station to interview him. One of the officers provided Clarke with a Miranda form and asked Clarke if he wished to waive his Miranda rights before signing it. Clarke responded to the officer's question by shaking

his head back and forth. One of the officer interpreted Clarke's response to indicate he wished to remain silent while the other officer thought Clarke shook his head to signal that he understood his Miranda rights. Clarke proceeded to speak with the officers and made some admissions. During the interview, Clarke asked officers whether he could go home after he talked with them. As a result of Clarke's statements, the officers charged him with indecent assault and battery. Clarke moved to suppress the statements he made to the officers arguing that his Miranda rights were violated.

Conclusion: Clarke's physical motions along with the fact that he asked the officers whether he had to talk to them before he could go home suggested that he did not want to speak. When Clarke asked the officers whether he really had to speak, the interrogation should have ceased. Based on the totality of the circumstances, the statements were suppressed. **When a defendant makes an ambiguous physical motion, the police should err on the side of caution and cease questioning.**

Is it lawful for police to use misleading tactics during interrogation in order to elicit a confession?

Bobby v Dixon, 132 S. Ct. 26 (2011)

Background: The defendant, Dixon, and another suspect were involved in murdering the victim for his car. While the police were looking into various leads, they had three encounters with Dixon. During the first encounter, Dixon went to the police station to retrieve his car which was impounded for traffic violations. While at the station, the police issued Miranda warnings to Dixon before questioning him about his potential involvement with the victim's disappearance. The police did not arrest Dixon and he declined to speak without a lawyer present. Five days later, the police intermittently interrogated Dixon at the station without issuing him his *Miranda* warnings. During this session of questioning, the police implied to Dixon that the other suspect was cooperating with them and may cut a deal. Dixon then admitted to the police that he stole the victim's identification but denied any involvement with the victim's disappearance. The police arrested Dixon on forgery charges and stopped the interrogation. On that same day, the police found the victim's body with the other suspect's cooperation. Four hours after interviewing Dixon, the police returned Dixon to the station where he was advised of his Miranda rights. Dixon signed a form waiving his Miranda rights and confessed to murdering the victim. Dixon moved to suppress on a number of issues but the relevant portion involves his confession. Dixon claims that the police used deceptive tactics to elicit a confession from him and therefore it should be suppressed.

Conclusion: The court examined each encounter with Dixon and determined the first encounter did not require Miranda warnings since Dixon was free to leave the station and was not under arrest. During the second encounter, where Dixon confessed to forgery,

the police should have issued Miranda warnings to Dixon because they were interrogating him without an attorney present. Lastly, the court held that Dixon's third encounter with the police was valid because he was issued Miranda warnings prior to confessing. Dixon's Mirandized confession was deemed valid since he voluntary stated that he wanted to explain what happened after communicating with his lawyer. Before confessing to the police, Dixon received his Miranda warnings twice and there was no evidence to suggest that the police coerced him. Additionally, four hours had passed since the police initially interrogated Dixon. Dixon during that time was transported to a jail and back again. **A substantial break in time and circumstances between the pre-warning statement and the Miranda warning is valid, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn.**

Are police required to issue Miranda warnings to a prisoner when questioning about unrelated crimes?

Howes v Fields, 132 S. Ct. 1181, (2012)
Background: The defendant, Fields, was escorted from his prison cell by a corrections officer to a conference room where two deputies questioned him about his involvement with alleged criminal activity prior to being incarcerated. Even though the deputies questioned Fields over the course of seven hours, Fields was told more than once that he was free to leave and return to his cell. The deputies never issued Miranda warnings to Fields and he made some incriminating statements. The police charged Fields with additional crimes and he moved to suppress the statements he made because the police never apprised him of his Miranda rights.

Conclusion: Although Fields was in prison, his incarceration does not automatically require Miranda warnings because he was not in custody. The court considered the fact that the prisoner "was free to return to his cell at any time, he was not physically restrained or threatened, was interviewed in a well-lit, average-sized conference room where the door was sometimes left open, and was offered food and water.". **In this case, the deputies did not restrain Field's movements. The court concluded that "service of a prison term, without more, is not enough to constitute Miranda custody."**

Can police testify about information they received through 911 calls?

United States v. Polidore, --- F.3d ----, 2012 WL 3264561 C.A.5 (Tex.), 2012
Background: The police responded to a specific location after receiving information from an anonymous caller that the defendant,

Polidore, was dealing drugs from his vehicle located in a parking lot. Within ten minutes of receiving the dispatch, the police arrived at the specified location and observed Polidore approach a vehicle matching the description provided by the 911 call. Polidore discarded a clear plastic bag on the floor of the vehicle as the police approached. The police recovered what they believed to be drugs and arrested Polidore. Polidore challenged the admissibility of the 911 call and stated that the call should have been suppressed because the police failed to establish the reliability of the caller.

Conclusion: The court held the statements to the 911 were admissible because the caller was making them contemporaneously with his observations and therefore fell within present sense impression exception of hearsay.

Can police question an individual about an incident without issuing Miranda Warnings if the individual is not in custody?

Commonwealth v Lavenider, 79 Mass. App. Ct (2011)

Background: The police received an anonymous tip that there was a white pickup truck driving erratically and striking things on a particular street. The police responded and observed a white pickup truck parked in front of the front door of the house and tire tracks on the lawn. The police heard noises and screaming coming from inside the house and they proceeded to enter. Once inside, the police spoke with the defendant, Lavenider, who informed the police that he had contraband inside the house. The police questioned Lavenider about what was going on and he admitted to being "cocked." Lavenider then stated he was going to kill one of the officers. The police arrested Lavenider for OUI and he filed a motion to suppress the statements.

Conclusion: Since Lavenider was not in custody, the police were not required to give him Miranda warnings. The court considered the location of the interview and the tone of the officers when determining whether Lavenider was in custody for Miranda purposes. In this case the police interviewed Lavenider in his own home and never accused Lavenider of criminal wrongdoing. The police questioned Lavenider only to find out what happened. The police did not restrain Lavenider and he was free to leave. Since Lavenider was not in custody and no Miranda was required, the court did not suppress any of the inculpatory statements Lavenider made.

Do false statements made by police during an interrogation diminish the voluntariness of the Defendant's Miranda waiver?

Commonwealth v Jermaine Holley, 79 Mass. App. Ct. 542 (2011)

Background: The police arrested the defendant, Holley, for outstanding warrants and interviewed him at the police station about a murder in which he was a potential suspect. During the interview the police falsely informed Holley that he had been "identified as being near the victim's apartment on the night of the murder by two sources, i.e., by a woman hanging out her laundry and by a family." The police recited Miranda warnings to Holley and asked him if he understood the oral recitation of Miranda. Holley nodded his head and stated "I know how it goes," and proceeded to speak with the police. Post interrogation, the police executed a warrant for an address, where Holley's girlfriend had moved following his arrest. During the execution of the warrant, the police located an opened a box left by the girlfriend in common area within the basement. The police seized a pair of sneakers that appeared to be the Adidas brand identified by the FBI as likely matching the size and tread of bloody footprints found at the murder scene.

Conclusion: There were two issues here. The first issue addressed whether Holley's waiver of Miranda was voluntary and whether the comments the police made tricked Holley into signing the waiver. The court held that Holley's actions and statements suggest that Holley's waiver of Miranda was voluntary. In regards to the use of trickery by the police, the court found that "if the use of a false statement is the only factor pointing in the direction of involuntariness, it will not ordinarily result in suppression, but that if the circumstances contain additional indicia suggesting involuntariness, suppression will be required." See ***Commonwealth v. DiGiambattista***, 442 Mass. at 432-433 (citations omitted). The second issue involved whether the police were justified in searching the common area of the basement. The court concluded that there was no reasonable expectation of privacy in a common area of an apartment.

D. Eye Witness Identification

Ways you can Identify Defendant

1. **Show up**
2. **Line up**
3. **Pictures**
4. **Field View**

Does an out- of- court identification that is suggestive violate due process?

Barion Perry v New Hampshire, 565 U. S. No. 10–8974 (2012) 132 S. Ct. 716 (2012)

Background: After receiving a call that there was someone breaking into cars outside of an apartment complex, the police responded to the location and observed the defendant, Perry near a car holding car-stereo amplifiers. While the officers detained Perry outside, the witness who initially called the police department spoke with police. The witness stated that she observed a tall, African-American man roaming the parking lot and looking into cars. Eventually, the man opened the trunk of a car, and removed a large box. The police asked the witness if she could identify the man she observed breaking into cars. The witness stood at her kitchen window and pointed to Perry, who was standing next to police officer and stated that was the man she observed. Perry was arrested and a month after identifying Perry on scene, the police showed the witness a photo array that included a picture of Perry. The witness was not able to identify Perry.

Conclusion: Since there was no evidence that the out-of-court identification was "procured under unnecessarily suggestive circumstances by law enforcement," the court held that the defendant's due process rights were not violated. Additionally, the court held that there is no requirement that a judge conduct a preliminary inquiry as to whether the out-of-court identification was reliable if there is no evidence that the identification was improperly made.

II. MOTOR VEHICLE LAW

1. Routine Motor Vehicle Infractions

a. Distracted Driving (Texting and Use of Mobile Phones)

Can police charge a driver with texting while driving even if they do not personally observe it?

Commonwealth v. Aaron Deveau (no cite available district court case)
Background: Deveau was texting while driving and crossed the center line crashing head on into another vehicle which killed the driver. This case was tried in Haverhill District Court.

Conclusion: The jury found Deveau guilty of two counts of vehicular manslaughter. The first count was based on texting while driving and the second was negligent operation of a motor vehicle. Deveau was sentenced to two years in the House of Corrections and loss of his license for fifteen (15) years. This case was significant because it was the first time in Massachusetts a person has been tried with negligently operating a motor vehicle by texting.

Penalties for ALL Drivers Texting while Driving in Massachusetts: All drivers are prohibited from texting while driving. Drivers cannot use any mobile telephone or handheld device capable of accessing the Internet to write, send, **or read** an electronic message including text messages, emails, and instant messages or to access the Internet while operating a vehicle. The law applies even if the vehicle is stopped in traffic.

- 1st offense-$100
- 2nd offense-$250
- 3rd or subs offense-$500

Other Prohibitions under the Texting Law

- Cell phone use prohibited for drivers under 18, as well as use of other mobile electronics. Fines as above, plus graduated license suspensions.
- School bus operators and other public transit drivers barred from using cell phones while driving. Fine: $500.

Penalties for Junior Operators Texting while Driving in Massachusetts Junior Operators in Massachusetts or drivers under the age of 18 with a learner's permit or provisional license – are prohibited from using cell phones (handheld or hands-free) while driving. The prohibition includes all mobile electronic device (mobile telephone, text messaging device, paging device, PDA, laptop

computer, electronic equipment capable of playing video games or video disks or can take/transmit digital photographs or can receive a television broadcast. Mobile electronic device does not include any equipment permanently or temporarily installed to provide navigation, emergency assistance or rear seat video entertainment. **Reporting an emergency is the only exception.** Drivers are encouraged to pull over and stop the vehicle to report the emergency.)

- 1st offense-$100, 60 day license suspension & attitudinal course
- 2nd offense-$250, 180 day suspension
- 3rd or subs offense-$500, 1 year suspension

Penalties for Commercial Motor Vehicles while Driving in Massachusetts pursuant to Federal Regulations 76 FR 82179, effective January 3, 2012, the use of hand-held mobile telephones by drivers of commercial motor vehicles (CMVs) is restricted.

Slow down for Emergency Vehicles Massachusetts: Pursuant to Chapter 89, Section 7C, the law requires Safety Emergency Driving operators of cars and other vehicles to pull into the left lane (when travelling on roads with 2-4 lanes heading in the same direction) if "practicable." If it is not practicable to change lanes, the law requires drivers to reduce speed and "proceed with caution."

d. Elderly Drivers

What is the role of law enforcement regarding the elderly driver legislation?

MGL c.90 s. 22 I : Mandatory in person renewal at a registry branch when the driver is **75 years and older** and also permits health care providers and law enforcement officers to report "cognitive or functional impairment or incapability to operate motor vehicle safely" to the Registry of Motor Vehicles.

- A health care provider acting in his professional capacity or **law enforcement officer and report** make a report to the registrar, requesting medical evaluation of the operator's ability to safely operate a motor vehicle as long as the report is not based solely on age or the diagnosis of a medical condition or cognitive or functional impairment
- The report shall be based on observations or evidence of the actual affect of that condition or impairment on the operator's ability to safely operate a motor vehicle.

- The registrar shall conduct a review to determine the operator's capacity for continued licensure to operate a motor vehicle, not later than 30 days after receipt of the report
- A report to the registry pursuant to this section shall be confidential and shall be used by the registrar only to determine a person's qualifications to operate a motor vehicle.

e. Non Resident Stops

Can a non United States citizen drive a motor vehicle in Massachusetts without a state driving license?

Commonwealth v Chown, 459 Mass. App. Ct. 756 (2011)

Background: The defendant, Chown, was stopped for speeding and then arrested for operating a motor vehicle without a license in violation of G. L. c. 90, § 10. Chown was a Canadian citizen. During the subsequent inventory search of his motor vehicle, the police recovered drugs, cash, and other items. As a result of the search incident to arrest, Chown was indicted for trafficking in cocaine, in violation of G. L. c. 94C, § 32E (b) (2), and possession of marijuana with intent to distribute, in violation of G. L. c. 94C, § 32C (a). Chown moved to suppress the evidence recovered arguing that the evidence was the fruit of an unlawful arrest because he did not need a Massachusetts driver's license to operate a vehicle in Massachusetts because he possessed a valid Canadian driver's license at the time of the stop.

Conclusion: During a routine traffic stop, a police officer, who suspects that a non-resident driver may be operating a vehicle in violation of M.G.L. c 90 §3 1/2, may request a copy of the operator's liability policy or insurance certificate. If the non-resident driver fails to produce the documents, the police officer may only issue a citation or summons, but cannot arrest the non-resident driver under G.L. c. 90, and failure to produce a license does not provide probable cause to arrest. In this case, the drugs that were recovered as a result of the inventory search were suppressed because the police did not have the authority to arrest Chown for violating M.G.L. c 90 § 31/2. Pursuant to M. G. L. c. 90, § 10, a non resident may operate a motor vehicle in Massachusetts "in accordance with section three [of G. L. c. 90]" as long as the non- resident is "duly licensed under the laws of the state or country where such vehicle is registered and has such license on his person or in the vehicle in some easily accessible place." M.G. L. c. 90 § 3 provides non residents living in Massachusetts with a thirty day window to acquire a valid Massachusetts license.

f. Altering Vehicles

Commonwealth v Miller, 78 Mass. App. Ct. 860 (2011)
Background: While traveling on Route 93 South in Stoneham, Massachusetts State Police Trooper Shea observed a GMC van move from the second travel lane into the first travel lane in front of his cruiser. Trooper Shea noticed that the vehicle's rear license plate had a black stripe across the bottom that covered the words 'Spirit of America.' Although the license plate number and registration were not blocked, Trooper Shea stopped the car because the [words 'Spirit of America' were] obscured. As Trooper Shea approached the vehicle from the passenger side, he noticed that the black stripe on the license plate appeared to be a camera. Trooper Shea issued a citation to the driver because he thought it was illegal to cover or obscure in any manner the register number or any other words, symbols or numbers lawfully imprinted or affixed to such number plate. After a hearing, it was determined that the Trooper Shea's issuance of the citation was wrong and that it was not illegal to affix a camera to a license plate holder.

Conclusion: Since Trooper Shea's citation was based on a mistake of law, any evidence recovered from the search of the vehicle was suppressed.

2. Operating a Motor Vehicle Under the Influence

a. 911 Calls

Are police permitted to ask investigatory questions without issuing Miranda rights?

Commonwealth v Steven McGrail, 80 Mass. App. Ct. 339 (2011)
Background: On November 18, 2006, the defendant, McGrail, was involved in a motor vehicle accident when he crashed his pickup truck into a utility pole along a public road in Framingham. McGrail's truck sustained severe front-end damage. The police responded to the crash and found McGrail about a half of mile from the scene of the accident. The police observed McGrail, bleeding from his head and elbow, staggering and noted that he smelled of alcohol. The police brought McGrail to the hospital where he was treated for his injuries. In the course of treating McGrail, hospital personnel wrote a toxicology report which included his blood alcohol level and statements he made regarding the accident. McGrail also made statements to police while they were questioning him about what happened. McGrail was charged with Operating Under the Influence and Leaving the Scene of an

Accident. McGrail moved to suppress the statements he made to the police and the admission of his blood alcohol content level claiming it was an illegal search and seizure.

Conclusion: McGrail's statements to the police were voluntary and did not require Miranda because he was not in custody. As a result, the statements were not suppressed. Second, McGrail's blood alcohol content level was admissible because it was part of the records that the hospital kept in the course of treating McGrail for his injuries.

b. "Operation" of a Motor Vehicle

Are keys in the ignition of a vehicle sufficient to charge a driver with Operating Under the Influence of Alcohol?

Commonwealth v Steven McGillivary 78 Mass. App. Ct. 644 (2011)

Background: An officer found the defendant, McGillivary, asleep in the driver's seat "slumped over the wheel of the van holding a roast beef sandwich in his hands, with sauce dripping down his hand and his feet in front of him." The officer noted that the vehicle's dashboard was illuminated and the key was in the ignition turned to the "on" position even though the engine itself was off. Although the engine was not running, the officer did not see anyone else near the van. As a result of their observations, the officer arrested McGillivary and charged him with Operating under the Influence of alcohol. McGillivary argued that the officer could not charge him with Operating Under the Influence of Alcohol because he was not operating the vehicle. According to McGillivary, a key is not sufficient to establish operation.

Conclusion: The court held that the officer can charge a person with Operating a vehicle While Under the Influence even if the person is slumped behind the driver's seat with the keys in ignition and electricity on but the car not running. A key in the ignition of a vehicle is sufficient to establish operation.

c. Toxicology Reports

Do police have access to a defendant's blood alcohol content level?

Commonwealth v Richard McLaughlin, 79 Mass. App. Ct. 670 (2011)
Background: A witness had called 911 to report a Mercedez Benz driving all over the road. The witness provided a location along with license plate number. When officers responded they observed a crashed Mercedez Benz with an unconscious person behind the wheel. The make, color, and license plate number matched the description of the vehicle that the witness had provided to 911. The police brought the defendant, McLaughlin, to hospital, where his blood alcohol content level was tested in the course of his treatment. As a result of their own observations and the blood alcohol content level, the police charged McLaughlin with Operating Under the Influence. McLaughlin challenged the admissibility of his blood alcohol content level and argued it was unlawful seizure.

Conclusion: McLaughlin's toxicology reports were admissible under M.G.L. c233 Section 79, which permits hospital records to be admitted. The hospital records are considered business records because they report how hospital personnel administer medical care of an injured person.

d. Shared Driveway

Does a shared driveway meet the "public way" requirement for charging a driver with Operating Under the Influence?

Commonwealth v Lisa Virgilio, 79 Mass. App. Ct. 570 (2011)
Background: The defendant, Virgilio was arrested for Operating Under the Influence near her residence. Virgilio lives in a single family home next to a two story multifamily dwelling. There is a paved driveway between both residences and the driveway leads to a wider parking area. The parking area does not lead to any businesses or public accommodations. Although there is no gate, there are no signs indicating that the parking area is open to the public.

Conclusion: The court held that the road Virgilio was driving was not a public way because it was a private residence and therefore the charge of OUI was dismissed.

3. Roadblocks and Sobriety Checkpoints

Is mere odor of alcohol sufficient reasonable suspicion to further detain an operator for further testing at as sobriety checkpoint?

Commonwealth v Baiznet, 76 Mass. App. Ct. 908 (2010)
Background: The police stopped the defendant, Bazinet, at a sobriety checkpoint after a trooper working the check point detected an odor of alcohol when speaking with her. Although the trooper did not observe Bazinet operating her vehicle, the trooper directed her to an area adjacent to the checkpoint for administration of field sobriety tests. When Bazinet exited the vehicle the trooper observed her eyes to be bloodshot and glossy and detected a strong odor of alcohol. Bazinet took the breathalyzer and exceeded the legal amount. Bazinet filed a motion arguing that the checkpoint procedures were not consistent with constitutional requirements.

Conclusion: Pursuant to Massachusetts State Police General Order (TRF-15), police have authority to detain drivers at field sobriety checkpoints if they detect an odor of alcohol emanating from the driver and have reasonable suspicion that driver may be impaired. As a result of these suspicions, police can ask the driver to perform field sobriety tests in the screening area. ***Commonwealth v. Murphy***, 454 Mass. App. Ct. 318 (2009).

Was the checkpoint unconstitutional because of the discrepancy between the press release's description of where it would occur and the actual nature of the site of the checkpoint?

Commonwealth v. Aivano, 81 Mass. App. Ct. 247 (2012)
Background: In August 2010, the State police announced a sobriety checkpoint in a press release and proceeded to conduct a checkpoint in a secondary state highway. However, the road where the checkpoint took place was a municipal road. The defendants were all stopped at the checkpoint and charged with operating a motor vehicle while under the influence of intoxicating liquor. Subsequently, the defendants challenged the validity of the arrests based on the inaccurate information issued in the press release.

Conclusion: Since press releases regarding checkpoints are not required, the discrepancy did not render the checkpoint unconstitutional.

4. Extraterritorial Stops

Does any officer have authority to stop a vehicle in a neighboring town if it is not an issue of fresh pursuit?

Commonwealth v Riedel, Mass. App. Ct 911 (2010)
Background: An officer stopped the defendant, Riedel, in Orleans for speeding. While the officer was following Riedel, he observed Riedel's vehicle cross the center line and the fog line. The officer activated his lights in Orleans but Riedels' vehicle actually stopped four-tenths of a mile into the next town. The officer arrested Reidel and charged him with Operating while Under the Influence of Alcohol and Operating Negligently so as to Endanger. The officer testified that when he initially activated his lights he did not believe Riedel had committed any arrestable offenses. Riedel challenged the arrest arguing that the officer did not have authority to pursue him into the adjacent town.

Conclusion: The court held that whether the officer believed Riedel had initially committed an arrestable offense does not minimize the facts surrounding the officer's pursuit. Riedel's erratic driving certainly is certainly an arrestable offense and therefore the officer had the authority pursuant to M. G. L. c. 41, § 98A, to pursue him into the neighboring jurisdiction.

Does any officer have authority to stop a vehicle in a neighboring town if there is a public safety concern?

Commonwealth v Steven Lahey, 80 Mass. App. Ct 606 (2011)
Background: A Norton police officer was escorting an ambulance towards a hospital in Attleboro. Once the ambulance arrived, the Norton officer drove his cruiser on Route 123 heading out of Attleboro. As he was driving, the officer observed a vehicle traveling in the wrong direction at a high rate of speed and passing vehicles in no pass zones. The officer reversed his direction and pursued the vehicle while calling Attleboro police for backup. The Norton police officer stopped the vehicle to prevent a fatal accident. Within minutes, the Attleboro police arrived. The defendant challenged the stop claiming that the officer had not authority to effectuate a stop because he was out of his jurisdiction.

Conclusion: The court held that the extraterritorial stop and detention of the vehicle was valid under inevitable discovery. Within minutes of stopping the vehicle, the Attleboro police arrived. The Norton officer made the stop not to arrest the defendant but to prevent a fatal accident.

5. Administrative Changes for Operating Under the Influence

a. Melanie's Law Loophole

Refusing a breathalyzer after two OUI arrests does not automatically result in a three year loss of license unless your first arrest resulted in a guilty finding.

Paul J. Souza v. Registrar of Motor Vehicles & another 462 Mass 227 (2012)

Background: Souza was arrested for operating a motor vehicle while under the influence of intoxicating alcohol and he admitted to sufficient facts and received a continuation without a finding. Souza refused to take the breathalyzer and his license was suspended for three months. Souza was arrested for a second offense of operating a motor vehicle while under the influence of alcohol and he refused to take a breathalyzer. The Registry of Motor Vehicles suspended Souza's license for a period of three (3) years pursuant to M.G.L. c. 90 § 24 (1) (f), which states that the Registry is required to take suspend an arrested driver's license for three (3) years for failing to submit to a breathalyzer test if the driver had been previously "convicted" of OUI. If the driver has not been convicted, the Registry of Motor Vehicles is required to suspend the driver's license for a period of one hundred and eighty days (180). Souza appealed the Registry's decision on the basis that he was not convicted on OUI in 1997.

Conclusion: There was a loophole in Melanie's Law in determining whether a continuation without a finding was considered a "conviction" for licensure purposes. Melanie's Law was passed in 2005 and it established harsher penalties for individuals who drove while intoxicated. After reviewing other cases, the court held that the "legislature did not intend an admission to sufficient facts to be treated as a conviction pursuant to M.G.L. c.90 § 24 (1) (f). As a result, Souza's license should only have been suspended for 180 days and not 3 years because Souza was not convicted of OUI in 1997.

b. Increased Fines for OUI Fees

Chapter 90, § 12 (b): Whoever, being the owner or person in control of a motor vehicle, knowingly permits such motor vehicle to be operated by a person who is unlicensed or whose license has been suspended or revoked shall be punished for a first offense by a fine of not more than $1,000 or by imprisonment in a house of correction for not more than 1 year or, for a second or subsequent offense by a fine of not less than $1,000 and not more than $1,500 or imprisonment in a house of correction for not more than 2 1/2 years, or both such fine and imprisonment.

Chapter 90, § 20: Operating a Motor Vehicle Without a License have been increased from not less than $100 nor more than $1000 to not more than $500 for a first offense, not less than $500 nor more than $1000 for a second offense, and not less than $1000 nor more than $2,000 for any subsequent offense.

III. DOMESTIC ASSAULT & BATTERY AND SEX CRIMES

A. Differences between 209A and 258 E Orders

	209 A Orders Restraining Orders	258 E Orders
Definition	**Suffering abuse:** ➢ Causing physical harm ➢ Or placing another in fear of imminent serious physical harm ➢ Or causing another to engage involuntarily in sexual relations by threat, force or duress **Includes Family or Household Members** ➢ Who are married or living together ➢ Related by blood or marriage ➢ Have a child together regardless of living arrangement ➢ Dating or engaged	**Harassment:** **3 or More Acts** 1)Aimed a specific person 2)Was willful and malicious 3)Intended to target the victim with the harassing conduct or speech, or series of acts, on each occasion; 4) Conduct or speech, or series of acts, were of such a nature that they seriously alarmed the victim; 5)Or one act that by force thereat or duress causes another to involuntarily engage in sexual relations 6)Or one act that constitutes one of crime of sexual assault, harassment and stalking
Jurisdiction	Family, Probate, District Courts, BMC and Superior Courts (except for dating relationships)	District Courts, Superior Court, BMC and Juvenile Court if both parties under 17 years old
Venue	Plaintiff's residence Plaintiff's former residence left to avoid abuse	Plaintiff's residence
Timeliness	No time constraints as when to file the order	No time constraints as when to file the order
Relief	No abuse the plaintiff No contact the plaintiff Vacate plaintiff's household, multiple family dwelling and workplace Pay restitution Temporary custody of minor child Surrender firearms, gun licenses and FID cards	Court can issue order that the (a) defendant refrain from abusing or harassing the plaintiff, (b) no contact with plaintiff, (c) remaining away from plaintiff's home or workplace and (d) pay restitution directly related to losses. **No Surrender of Firearms or FID Card**

1. Domestic Violence Changes

a. Adding Cruelty to Animals to 209A Orders

St.2012, c.193 An Act Further Regulating Animal Control Effective October 31, 2012, the court may order the possession of a pet to the plaintiff or petitioner and "may order the defendant to refrain from abusing, threatening, taking, interfering with, transferring, encumbering, concealing, harming or otherwise disposing of such animal" pursuant to MGL c.209A, § 11, as added by St. 2012, c.193, § 50. This act also regulates health certificates for dogs and cats brought into or sold in Mass, kennel licenses, nuisance and dangerous dogs, euthanasia, animal cruelty, protection for animals in domestic violence restraining orders and more Signed Aug. 2, 2012. M.G.L. c. 209A Abuse Prevention.

b. Stalking and Criminal Harassment

What conduct constitutes criminal harassment under M.G.L. c. 265, s. 43A?

Commonwealth v. McDonald, 462 Mass. App. Ct. 236 (2012)

Background: On May 6, 2009, a neighbor observed the defendant parked in a white truck watching the victim's house and taking pictures around the time the school bus dropped off her children. After observing the white truck in the same location, the following the day, the neighbor contacted the victim and provided the registration number of the truck. The police tracked down the defendant and he apologized indicating he was taking photos of the victim's dog. The defendant returned to the victim's house and parked at base of her driveway after the police contacted him. He continued driving by for days afterward. The police finally issued a no trespass order and he was arrested. The defendant was found guilty of criminal harassment and he appealed the conviction arguing that driving on a public street and stopping in front of someone's house does not amount to criminal harassment.

Conclusion: The court overturned the conviction and held that "staring, without more, is not "sinister." Under MGL c. 265, s.43A, "The act of regularly driving on a public street, looking at people in their driveways or on their porches, or at their dogs and gardens, cannot alone support conviction of a wilful and malicious act directed at a specific person." Missing was any evidence of a connection to the complainant, or of prior conduct or communication that, together with seemingly innocuous acts, might have lent them a more sinister air." The bottom line is that in order to prove the elements for criminal harassment under M G. L. c. 265, § 43A

which are listed in the graph above, there would have had to been some connection between defendant's actions and the complainant. **Stopping in front of someone's house is NOT criminal harassment.**

B. Sex Crimes

a. Child Pornography

Is possession of photographs of naked minors sufficient to establish lewd behavior?

Commonwealth v Sullivan, 82 Mass. App. Ct. 293 (2012)

Background**:** The defendant, Mark Sullivan, was convicted of one count of possession of child pornography, G.L. c. 272, § 29C(vii), and possession of child pornography as a subsequent offense, G.L. c. 272, § 29C after he printed a photograph of a naked adolescent girl while using a computer at Hingham library. Sullivan argued that the photograph did not contain a lewd exhibition as detailed under M.G.L. c G.L. c. 272, § 29C(vii).

Conclusion: The court examined whether the picture that Sullivan was looking qualified as lewd and determined that nudity alone was not sufficient for a finding of lewdness. The court applied a number of factors that were examined in a companion case, ***United States v. Dost,*** 636 F. Supp. 828, 832 (S.D.Cal.1986). The factors are listed below:

FACTORS CONSIDERED

2. Focal point = what part of child's anatomy was photographed
3. Setting = where the photographs taken
4. Age = age of child in photographs
5. Clothing = fully or partially clothed, or nude
6. Depiction – photograph suggests sexual coyness or a willingness to engage in sexual activity
7. Intent = were photographs designed to elicit a sexual response in the viewer.

b. Human Trafficking

Human Trafficking Bill Chapter 178 An Act Relative to the Commercial Exploitation of People H 3808

The bill establishes that human trafficking is a crime under M.G.L. 265. Specifically, "human trafficking or commercial sexual activity is a crime under § 26 D of Chapter 265; trafficking of persons for sexual servitude under § 50 of Chapter 265; a second or subsequent violation of human trafficking for sexual servitude under § 52 of Chapter 265.

- Penalties: 5 years in prison and a fine of up to $25,000, and it imposes a life sentence for anyone found guilty of trafficking children for sex or forced labor
- The bill establishes trust fund for victims and creates a ''safe harbor'' to protect sexually exploited children from being prosecuted for certain sex crimes

IV. DRUG ENFORCEMENT

1. Common Issues with Drug Cases

a. *Decriminalization of Marijuana*

Can police charge a defendant with possession with intent to distribute Marijuana?

Commonwealth v. Keefner, 461 Mass. 507, 514-515 (2012)

Background: The police received a call from a woman indicating that there were six people smoking marijuana on her property including her daughter. The police responded to the location and observed a group of people, including the defendant, Keefner, sitting on the woman's front porch. The woman who had initially called police identified Keefner as one of the individuals who was smoking marijuana. Since one of the officers recognized Keefner from a prior arrest involving marijuana possession and possession of cocaine with intent to distribute, the officer searched him. The officer recovered three sandwich bags of marijuana, a cell phone, and $98. The officer observed a text message on Keefner's phone that asked to purchase $20 worth. Although the amount of marijuana weighed less than an ounce, the officer placed Keefner under arrest. Keefner challenged the arrest stating that it was not valid since he possessed less than one ounce.

Conclusion: The police can charge individuals with possession with intent to sell even if there is less than ounce of marijuana if there is evidence the individual was not only possessing the marijuana. The passage of M.G.L. c. 94C, §32L, the marijuana decriminalization statute, did not repeal the offense of possession of marijuana with intent to distribute, in violation of G.L. c. 94C, §

32C (a), where the amount of marijuana possessed is one ounce or less. Pursuant to M. G.L. c. 94C, § 32L, the act does not limit prosecution for selling the sale of any amount of marijuana.

Were police justified in searching the defendant after they observed him looking into a residence and detected an odor of marijuana on his person?

Commonwealth v Brian Dee, 461 Mass. App. Ct. 1008 (2012)
Background: The police executed search warrant at a residence in Natick. During the execution of the search warrant, the police saw the defendant, Dee, look inside the residence. The police conducted a pat/frisk of Dee because they smelled a strong odor of marijuana coming from Dee's backpack. The police arrested Dee and searched his backpack, finding a cell phone, bottle of eye drops, rolling papers, cash, and fourteen individually wrapped plastic baggies of marijuana. The marijuana weighed less than one ounce. The police charged Dee with possession with intent to distribute in a school zone. Dee challenged his arrest and argued that since the amount of marijuana that he possessed weighed less than ounce, he could not be charged because Massachusetts Law decriminalized possession of marijuana weighing less than an ounce.

Conclusion: The police lawfully charged Dee with possession with intent to distribute even though amount of marijuana weighed less than ounce because of passage of G.L. c. 94C, § 32L, only applied to possession. The same principles that were upheld in ***Commonwealth v. Keefner***, applied in this case.

b. School Zone Changes

Chapter 192 of the Acts of 2012 (Melissa's Bill):
Background: Lawmakers passed the bill to limit parole for criminal offenders who had three or more serious criminal convictions on their record. The bill was passed after a woman named Melissa Gosule was murdered in Cape Cod by a career criminal who was on parole. The bill states that "whoever has been convicted three or more times of an enumerated violent offense shall be considered a habitual offender and shall be punished by incarceration at a state prison for the maximum term provided by law. No sentence thus imposed shall be reduced or suspended, nor shall such person be eligible for probation, parole, work release or furlough." In addition to denying parole for the serious offenders, the bill included significant changes regarding drug offenses. Specifically, Melissa's bill modifies the law regarding **school zones** and the **increases the weight amount required for drug trafficking**. Pursuant to

Melissa's bill the square footage for school zones has decreased from 1,000 feet to **300 feet of a public or private accredited pre-school, elementary, vocational, high school or other qualifying institution**. Further the school zone law does not apply between the hours of midnight and 5 AM since school would be closed. Additionally, Melissa's Bill has decreased the minimum mandatory sentencing requirement associated with trafficking controlled substances (marijuana, cocaine, heroin, etc) and had reduced the gram requirements to substantiate a charge for trafficking for cocaine, crack cocaine, heroin and other Class A and Class B narcotics. The minimum trafficking weight for cocaine, crack cocaine, heroin, morphine and opiates has increased from 14 grams to 18 grams. If a defendant possesses any narcotics weighing less than 18 grams, the defendant can only be charged with possession with intent or distribution and not trafficking.

c. Use of Confidential Informants

Protection of Confidential Informants (Rachael's Law):

Background: Rachael Hoffman was a college student in Florida who agreed to cooperate with authorities after police found drugs in her apartment. Rachael was used as a confidential informant and she had no training. Rachael was murdered while working as an informant. On May 7, 2009, the Florida State Senate which brought into effect on July 1, 2009 a number of requirements for law enforcement agencies in Florida regarding the use of police informants. Rachel's Law" requires law enforcement agencies to (a) provide special training for officers who recruit confidential informants, (b) instruct informants that reduced sentences may not be provided in exchange for their work, and (c) permit informants to request a lawyer if they want one.

d. Drug Certifications

Are drug certifications admissible without an expert?

Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009)

Background: On February 20, 2004, the Marshfield and Abington police arrested the defendant after setting up a controlled drug with an informant. After the defendant was arrested, police searched the vehicle and found a secret compartment above the glove compartment which contained heroin and cocaine. The defendant was found guilty of possession with intent to distribute heroin after drug certifications were admitted without testimony for verification. The defendant alleged that his sixth amendment rights were violated because he could not confront the expert who analyzed the seized drugs.

Conclusion: The court concluded in order for drug certifications to be admissible in court, prosecutors would need to have an expert testify to its authenticity.

e. Admissibility of Cell Phone Content Used in Undercover Buy

Is Police Testimony regarding incoming phone calls from a seized cell phone admissible?

Commonwealth v Mendes, 463 Mass. App. Ct. 353, 2012

Background: The police applied for a search warrant after receiving information from two confidential informants (hereinafter referred to as "CI") that the defendants were involved in drug dealing. The CI's credibility was supported by police knowledge that the defendants lived in the particular residence detailed in the search warrant. During the execution of the search warrant, the police recovered cellular telephones from the defendants' bedrooms and answered incoming asking to purchase drugs. The defendants were arrested and challenged the validity of the search warrant and also the admissibility of the calls the police answered from the confiscated cell phones.

Conclusion: The search warrant was valid because the police were able to establish a nexus between the defendants and the residence. Second, the court held that the defendant's confrontation clause was not violated. The police testimony regarding the incoming calls on the confiscated cell phones was admissible for the non hearsay purpose of demonstrating that the phones were used in drug transactions. The court further stated while an extrajudicial statement under a hearsay exception is not determinative as to a defendant's confrontation rights, is not applicable when the statements at issue are offered for a non hearsay purpose, rather than through a hearsay exception. See *Crawford v. Washington, supra.* This distinction is critical, as statements admitted as exceptions to the hearsay rule may be admitted for their truth, thereby implicating confrontation clause concerns.

f. Constructive Possession

Can police charge a person with constructive possession with intent to distribute if evidence that person could have dominion and control over the items?

Commonwealth v Caraballo, 81 Mass. App. Ct. 536, 2012

Background: The police applied for a search warrant after monitoring an apartment where they observed a group of people that "appeared to be drug-dependent individuals" following the defendant, Caraballo, inside the apartment. The police recovered five bags of heroin from Caraballo and eighty-six bags of heroin from a purse that was located on top of a refrigerator. The packaging of the five bags found on Caraballo and the eighty-six bags in the purse were similar in appearance. The police also recovered a "drug ledger," a digital scale, a sifter, rubber bands, unmarked bottle of pills and cash. The police arrested Caraballo and charged him charged with constructive possession with intent to distribute. Caraballo challenged the charge arguing the police could not prove possession.

Conclusion: There were two issues before the court. The first issue was whether the police had sufficient evidence to charge Caraballo with constructive possession with intent to distribute heroin. Even though the police recovered pills from a purse and a dresser drawer, the court held that there was sufficient evidence to demonstrate that Caraballo had" knowledge and ability to exercise dominion and control over the drugs." ***Commonwealth v. Gonzalez***, 452 Mass. 142, 146 (2008) quoting from ***Commonwealth v. Boria***, 440 Mass. 416, 418 (2003). The court held that the police recovered correspondence with Caraballo's name on it and that the building's address, drug paraphernalia to mix and package drugs, and the drug ledger satisfied the constructive possession that Caraballo had "knowledge and the ability to intention to exercise dominion and control over the drugs." Second, the court considered whether the detective's description of the individuals' appearance outside the building was permissible profiling testimony or whether his testimony proffered an opinion about the defendant's guilt. The officer's testimony about the characteristics he observed of drug dependent individuals was permissible because he had extensive training and experience with narcotis.

g. Homeless Shelters

Does a Juvenile have a Reasonable Expectation of Privacy while staying at a family shelter?

Commonwealth v. Porter, P. 456 Mass. 254 (2010)

Background: The police recovered a firearm during a search of a juvenile's room in a transitional family shelter after being notified by the shelter's director that the juvenile allegedly possessed a gun. The police determined that the director had the authority to consent to their entry and conducted a warrantless search of the juvenile's room with her consent. After the police found the gun, the juvenile made a statement suggesting the gun belonged to him. The juvenile was charged with delinquency by reason of the unlawful

possession of a firearm and ammunition. The juvenile challenged whether the shelter director had authority to allow the police to search his room.

Conclusion: The court concluded that the search of the juvenile's room was unlawful and that the shelter director did not have authority to allow police to search the juvenile's room because this was equivalent to a home for the juvenile and his mother. Although the shelter director had a master key and could enter the room "for professional business purposes" do not diminish the legitimacy of juvenile's privacy interest in the room.

V. GUNS AND WEAPONS

a. Types of Weapons

a. Definition of a Knife

Is a Dirk Knife Considered a Dagger under MGL c. 269 s10 (b)?

Commonwealth v Ismael Garcia, 82 Mass. App. Ct. 239 (2012)
Background**:** On the evening of September 5, 2005, Robert DeMenzes (the victim) and his girlfriend were "hanging out" in Ruggles Park in Fall River looking to buy marijuana from an individual named "E." When "E" arrived at the park with the defendant, the victim and his girlfriend observed the defendant holding an item that was later identified as a "pimp cane." The defendant removed the cover of the "pimp cane" which revealed a "big blade" that was about eleven inches long. The defendant ran after the victim and stabbed him causing life-threatening wounds.

Conclusion: The court held that the jury was correct in finding that the weapon possessed by the defendant fell within the definition of a "dagger" under M.G. L. c. 269, § 10(b) because the knife the defendant had was approximately eleven inches in length.

b. Definition of a Firearm

Can police charge two defendants with constructive possession of a firearm, if the firearm is not operable?

Commonwealth v Jefferson, 461Mass. 821(2012)

Background: The police proceeded to stop a vehicle after they observed the vehicle drive through a red traffic light. Once the officers stepped out of the cruiser, the vehicle drove away at a high rate of speed, which led to a high speed pursuit. Although the officers could not locate the vehicle for a few minutes, they were able to find it again and effectuate a stop. When the officers removed the passengers they observed the front passenger window of the vehicle was "all the way down." The police searched the area to see if anything was discarded and located some broken plastic which was consistent with firearm handle. Within a short distance of the stop, a Harrington & Richardson .32 caliber five-shot revolver, loaded with three rounds. The police charged the defendants with joint possession of a firearm. The police tested firearm and determined that it was not operable and therefore failed to meet the definition of a firearm under G. L. c. 140, § 121, because it could not discharge as shot or a bullet. Additionally, no fingerprints were lifted from the firearm.

Conclusion: The court examined whether the defendants jointly possess the firearm and whether the revolver qualified as a firearm under MGL c. 140 Section 131. In regards to the possession issue, the court found that although the police did not recover fingerprints or observe the defendants throw the revolver out the window, there was sufficient evidence to show joint possession. (I.e. location of the firearm in the middle of the walkway, the broken pieces of the handle found near the revolver that the firearm had hit the ground with enough force for the handle to break into pieces, suggests the firearm was thrown from a moving vehicle and the fact that no pedestrians were seen in the area) Lastly, the court considered that the revolver did not qualify as a working firearm under M.G. L. c. 140 section121 because it could not discharge a bullet and the model and year the revolver were made.

VI. JUVENILE LAW

c. School Searches

Does a juvenile have an expectation of privacy in regards to his school issued student identification?

Commonwealth v. Zachary Z, 462 Mass. 319, (2011)

Background: The victim of a robbery reported that a student attending the same school produced a knife and stole his cell phone and ipod after he got off the bus. The police found a backpack containing an item with the juvenile's name on it at the scene which led them to suspect that the juvenile may be the assailant. As a result of finding the backpack, the police requested without a search warrant or subpoena, that the school produce the juvenile's student identification card which included a photograph. The school provided the identification to the police and they arrested the juvenile. The juvenile filed a motion to suppress arguing that the school violated his privacy rights when it turned over his student identification to police.

Conclusion: The judge remanded the case to juvenile court because it was unclear how the photograph was taken and unable to make a determination as to whether juvenile would have a reasonable expectation of privacy.

Can police search student lockers, backpacks and purses?

New Jersey v .T.L.O., 105 S. Ct. 733 (1985)

Background: A teacher brought two students to the principal's office after the students were caught smoking in the school bathroom. The principal questioned the students and searched the purse of one of the students. While searching the purse, the principal discovered cigarettes along with marijuana and drug paraphanelia. The student challenged the search alleging the principal violated her fourth amendment rights when she searched the interior of her purse.

Conclusion: The court held that public school officials can conduct searches like law enforcement officers if they have reasonable suspicion that the students violated school policy or the law. While students have some legitimate expectation of privacy, the school's overarching obligation is to ensure the safety of the students attending the school. The court has held in the past that school officials do not need to obtain a warrant before searching students who are under their authority. Whether the search is legal depends

upon the circumstances. In this case, the court held that the school officials were reasonable in searching the student's purse because she had been caught smoking and there was a suspicion that the cigarettes were in her purse.

B. Bullying

	Cyberbullying	**Bullying**
Definition	Cyber-bullying"bullying through the use of technology or any electronic communication, which shall include, but shall not be limited to, any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo electronic or photo optical system, including, but not limited to, electronic mail, internet communications, instant messages or facsimile communications. Cyber-bullying shall also include the creation of a web page or blog in which the creator assumes the identity of another person or the knowing impersonation of another person as the author of posted content or messages, if the creation or impersonation creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying. Cyber-bullying shall also include the distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that may be accessed by one or more persons, if the distribution or posting creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying.	M. G. L. Chapter 71 Section 37O. (School bullying) Repeated use by one or more students of a written, verbal or electronic expression or a physical act or gesture or any combination thereof, directed at a victim that: (i) causes physical or emotional harm to the victim or damage to the victim's property; (ii) places the victim in reasonable fear of harm to himself or of damage to his property; (iii) creates a hostile environment at school for the victim; (iv) infringes on the rights of the victim at school; or (v) materially and substantially disrupts the education process or the orderly operation of a school. For the purposes of this section, bullying shall include cyber-bullying
Where Can Happen	➢ School Grounds ➢ Surrounding property adjacent to school grounds ➢ School buses or school bus stops ➢ School sponsored events ➢ Non school-related events ➢ Any technological device (mobile devices, facebook, email, fax, instant messaging and text etc.	➢ School Grounds ➢ Surrounding property adjacent to school ground ➢ School buses or school bus stops ➢ School sponsored events ➢ Non school-related ➢ Any technological device (mobile devices, facebook, email, fax, instant messaging and text etc.

Role of Law Enforcement	➢ May pursue criminal charges against perpetrator after school officials investigate, take appropriate discipline action and contact parents ➢ Law enforcement must be involved if bullying involves former student under age of 21	➢ May pursue criminal charges against perpetrator after school officials investigate, take appropriate discipline action and contact parents ➢ Law enforcement must be involved if bullying involves former student under age of 21
Retaliation	➢ Can not retaliate against person who reports or is a witness or has reliable information about bullying	➢ Can not retaliate against person who reports or is a witness or has reliable information about bullying

VI. CRIMINAL ISSUES AND TRENDS TO WATCH

a. Videotaping Police

Glik v. Cunniffe, 655 F. 3d 78C.A.1 (2010)
Background: The police were arresting a man in downtown crossing for an offense. While effectuating the arrest, the defendant, Glik started videotaping the police with his smart phone. The police arrested for Glik for violating the wiretapping statute but did not charge him obstructing justice. Glik challenged the matter and asserted that his first amendment rights were violated.

Conclusion: The case settled but it was determined that as long as the police are aware they are being recorded, it is not unlawful for a citizen to to film law enforcement officers, in the discharge of their duties in a public space, was a well-established liberty safeguarded by the First Amendment at time of citizen's arrest, and therefore officers were not entitled to qualified immunity from arrestee's § 1983 First Amendment claim.

Christopher Sharpe v Baltimore Police Department, [No citation for this case yet]
Background***:*** Sharp is suing the Baltimore police for destroying the video archive on his smart phone after he recorded officers arresting his friend.

Conclusion: The Department of Justice has intervened and issued a letter stating that it is a person's first amendment right to videotape police officers in public. No decision on Sharpe's lawsuit has been issued.

b. Evidence & Public Information

How long are law enforcement agencies required to preserve and maintain evidence for future appeals?

Post- Conviction Access to Forensic and Scientific Analysis Act, 2012 Mass. Acts, c. 28

Background: On February 17, 2012, this act mandated that all wrongfully convicted defendants have access to scientific and forensic analysis of evidence involved their cases. Specifically, the act requires that Massachusetts implement state-wide retention regulations and preservation of evidence in criminal cases. **"Each governmental entity shall retain all such evidence or biological material in a manner that is reasonably designed to preserve the evidence and biological material and to prevent its destruction or deterioration."** The director of the crime laboratory within the department of state police has to regulate retention policies for other police departments. The regulations shall include standards for maintaining the integrity of the materials over time, the designation of officials at each governmental entity with custodial responsibility and requirements for contemporaneously recorded documentation of individuals having and obtaining custody of any evidence or biological material.

Conclusion: This act pertains only to scientific evidence NOT physical evidence. According to M.G. L. Chapter 135§ 8, there is no legal bar for police departments to dispose of old evidence after a month, if the physical evidence is unclaimed or not designated evidence in an active criminal case.

c. CORI reform (Ban the Box)

The Ban the Box provision of the new CORI law does not bar Police Departments from asking applicants whether they were convicted of a felony!

Ban the Box: The "Ban the Box" provision in the law went into effect on November 10, 2010 and makes it illegal for most employers to ask applicants whether they have a criminal record during the initial job application. The only EXCEPTION to the "Ban the Box" requirements is when a state or federal law creates a legal presumption that a person is disqualified for a job based on certain convictions, or the law permits the particular employer to ask.

- Police Departments can ask applicants whether they have been convicted of a felony because in Massachusetts if you have a felony conviction on your record, you cannot get a firearms license and therefore cannot become a police officer.

What can police lawfully disseminate to the public?

Information that Police Departments CAN WITHHOLD

1. Sexual assaults and rapes
2. Open criminal investigations
3. Information about victims and witnesses

d. Sealing Records and Expungement

Police Departments DO NOT seal records without judicial order from the court!

Convictions that can NEVER be sealed

1. Level 2 and 3 Sex offenders
2. Convictions against public justice, including resisting arrest, witness intimidation, or escape from jail can NEVER be sealed
3. Certain firearms convictions and convictions for violations of the state ethics and conflicts of interest laws (i.e. bribery of an elected official, etc.) can NEVER be sealed.

Convictions that can be sealed

- Abuse prevention and harassment order convictions have a 10 year waiting period before they are sealed
- Any conviction for a sex offense that required registering with the Sex Offender Registry as a level 1 is not eligible for sealing until 15 years after the very last event in the case, including the end of any period of supervision, probation, parole, or release from incarceration
- first time drug **possession** conviction where the person did not violate any court orders connected to being on probation or a "CWOF" (continuance without a finding), such as going to drug treatment or doing community services
- any cases where you were found "not guilty," and any cases that were dismissed or ended in a nolle prosequi

Commonwealth v. Boe, 456 Mass. 337 (2010)
Background: The police charged a female, Tina Boe, with leaving the scene of an accident involving personal injury because she was the registered owner of the vehicle. However, the police report indicated at the time of the accident that the operator of the vehicle was described as a male and not a female. As a result of the mistake, Boe moved to dismiss the charges and have her record expunged.

Conclusion: Although the court recognized that judges have authority to correct a record, there is no evidence that Boe's probation record is erroneous and therefore it should be sealed and not expunged.

Commonwealth v. Moe, N.E.2d ----463 Mass. 370SJC-11124 (2012)
Background: The defendant, Moe, was falsely accused of assaulting the victim with a gun. After the criminal complaint issued, the police became aware that the alleged victim had lied. The prosecutor filed a nolle prosequi and Moe later moved to expunge his criminal records, arguing that the judge had authority to do so because the victim had committed fraud on the court.

Conclusion: The court held that based on ***Commonwealth v Boe***, the judge lacked authority to expunge records of assault case that had arisen from fraudulent accusation.

e. Internal Affairs Records and Testifying in Court

Are Police Internal Affairs Records Discoverable?

Commonwealth v Adjutant, 443 Mass. 649 (2005)
Background: The defendant, Adjutant, worked as an escort and was hired for a job in Revere. Upon arrival, Adjutant met a man identified as Whiting who led her to the basement demanding intercourse. Adjutant phoned the escort's dispatcher to verify that Whiting had only paid for a massage. Whiting demanded a total refund and the dispatcher told Adjutant to leave the residence. The facts of what happened next are conflicting. Adjutant claims she fatally stabbed Whiting in self defense trying to escape the apartment while Whiting chased her with a crow bar. During the trial, Adjutant attempted to admit Whiting's prior acts of aggression.

Conclusion: The court held that the victim's prior violent acts of aggression were relevant and could assist in determining who was the first aggressor where there is claim of self-defense and the identity of the first aggressor is in dispute. As a result of this case, many defense attorneys are filing Rule 17 (Third Party Records) Motions requesting that police departments release internal affairs records of their officers. While not every department has designated police internal affairs records as public record, judges are ruling that the records be turned over if defense counsel can demonstrate an officer has a history of use of force complaints. The Rule 17 Motions are typically filed if the police charge defendants with resisting arrest. Unfortunately, many officers are unaware that the records have been turned over and in some instances some officers have no knowledge that a complaint has been filed against them.

How are the Internal Affairs Records Used?

a. **Records are used to impeach officers while testifying**
b. **Records are used to demonstrate that officers may have had a history of use of force complaints filed against them and therefore was the first aggressor**